IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

HOPE ACADEMY BROADWAY CAMPUS, *et al*	:	**Case No. 10CVC 05 7423**
Plaintiffs	:	**JUDGE BENDER**
v.	:	
WHITE HAT MANAGEMENT, LLC, *et al*	:	
Defendants	:	

THE OHIO DEPARTMENT OF EDUCATION'S BRIEF IN SUPPORT OF JURISDICTION

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SUMMARY OF ARGUMENT

R.C. 2305.01 gives common pleas courts jurisdiction over all civil cases exceeding the monetary jurisdiction of the municipal court. Jurisdiction presumably exists here because this is a civil case involving millions of public dollars. There is no legal or practical basis for deviating from this presumption.

A. R.C. 3314.024 cannot abrogate jurisdiction because it is silent on that topic.

"[W]hen the General Assembly has intended to abrogate the subject-matter jurisdiction of Ohio courts … it has done so expressly." *BCL Enters. v. Ohio Dep't of Liquor Control* (1997), 77 Ohio St. 3d 467, 471. "[A]n intention to utterly destroy … jurisdiction should not, by implication, be imputed to the legislature, unless that purpose clearly manifests itself." *Black v. Boyd* (1893), 50 Ohio St. 46, 55. R.C. 3314.024 does not address, let alone abrogate, this Court's jurisdiction to resolve contractual disputes, enforce fiduciary duties, or determine the title to property. And although it does mention accounting, it contains nothing limiting the Court's jurisdiction to enforce contractual accounting requirements or to provide the equitable remedy of fiduciary accounting. The fact that the Auditor of State ("AOS") has authority to audit a management company's dealings with a school is immaterial because the existence of regulatory authority does not eliminate judicial jurisdiction over contract claims. *Southgate Development Corp. v. Columbia Gas Transmission Corp*. (1976), 48 Ohio St. 2d 211, 215.

B. R.C. Chapter 117 does not shift jurisdiction from the Court to the AOS.

An administrative "agency has no authority beyond the authority given to it by statute," and "can only exercise those powers … expressly conferred upon it by the Ohio General Assembly." *Ohio Fresh Eggs, LLC v. Boggs* (10th Dist.), 183 Ohio App. 3d 511, 2009-Ohio-03060, ¶¶ 10, 18. Further, "courts are without authority to create jurisdiction when the statutory

language does not." *Id*. at ¶ 20. Chapter 117 does not authorize the AOS to resolve disputes between audited entities and third parties, nor does the Ohio Department of Education (~~O~~DE") understand the AOS to seek such jurisdiction.

C. This case can go forward without a finding under R.C. 117.28.

The courts have consistently held that a public body need not have an audit finding in order to enforce its rights. *Gibbs v. Greenfield Exempted Vill. Sch. Dist. Bd. of Educ.* (4th Dist.), 2001-Ohio-2638, 2001 Ohio App. LEXIS 6016 at **22-23; *White v. Columbus Bd. of Education* (10th Dist. 1982), 2 Ohio App. 3d 178, 180; *Harmony Community—Cincinnati v. Ohio Dept. of Education* (Nov. 20, 2008), Franklin Co. C.P. No. 08CVH09-12593, p. 12.

D. There is no possibility of a conflict with the Auditor over compliance with R.C. 3314.024.

The AOS has never made any finding about compliance with R.C. 3314.024. The schools' audits expressly declined to opine on compliance with ~~l~~laws … which could have a direct and material effect on the determination of financial statement amounts." R.C. 3314.024 is surely such a law. None of the claims pressed here challenge any AOS finding. Neither ODE nor the Schools ask the Court to review any finding. The Schools' accounting claim seeks a remedy that is qualitatively distinct from an audit.

***

Common pleas courts ~~h~~have the … duty to exercise such jurisdiction as may be validly conferred upon them[.]" *State ex rel. Schneider v. Brewer* (1951), 155 Ohio St. 203, 204. R.C. 2305.01 gives this Court jurisdiction over this case, and there is no factual or legal basis for doubting that jurisdiction. This case should proceed.

ARGUMENT

A. There is no legal barrier to jurisdiction.

1. Common pleas courts are presumed to have subject matter jurisdiction absent an express statutory abrogation.

Supreme Court precedent recognizes that ~~"t~~here is always a presumption in favor of the jurisdiction of a court of general jurisdiction." *Kane v. Kane* (1946), 146 Ohio St. 686, 692. It also establishes that ~~"t~~he court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it." *BCL Enters. v. Ohio Dep't of Liquor Control* (1997), 77 Ohio St. 3d 467, 469. That jurisdiction is broad in civil cases; R.C. 2305.01 gives them ~~"j~~urisdiction in *all* civil cases" involving the amount in controversy (emphasis added). Further, that jurisdiction must be utilized once it is invoked; common pleas courts ~~"h~~ave the … duty to exercise such jurisdiction as may be validly conferred upon them[.]" *State ex rel. Schneider v. Brewer* (1951), 155 Ohio St. 203, 204.

While the legislature may abrogate that jurisdiction, it must be very clear in doing so. The general rule is that ~~"[c~~]ourts strictly construe statutes which deprive a court of jurisdiction[.]" 3A *Statutes and Statutory Construction* (7th Ed. 2010), § 67.3. Ohio follows that rule; ~~"[s~~]tatutes, [] that abrogate or abridge [] jurisdiction, are to be strictly construed, and if the restrictive purpose is not clear it will not be extended by construction." *Black v. Boyd* (1893), 50 Ohio St. 46, 54, overruled on other grounds (1908), 78 Ohio St. 239. Consequently, ~~"w~~hen the General Assembly has intended to abrogate the subject-matter jurisdiction of Ohio courts in particular types of actions it has done so expressly." *BCL Enters. v. Ohio Dep't of Liquor Control* (1997), 77 Ohio St. 3d 467, 471. Further, ~~"a~~n intention to utterly destroy … jurisdiction should not, by implication, be imputed to the legislature, unless that purpose clearly manifests itself."

Black, 50 Ohio St. at 55. The Supreme Court therefore sustains common pleas courts' jurisdiction unless a statute explicitly references and curtails it. *Id.; Black*, 78 Ohio St. at 54.

This case is within R.C. 2305.01's jurisdictional grant; it is a civil case involving millions of dollars. This Court must therefore exercise jurisdiction unless another statute has expressly abrogated that jurisdiction. None of the statutes involved here do so.

2. R.C. Chapter 3314 does not abrogate jurisdiction.

a. R.C. 3314.024 does not mention, let alone abrogate, jurisdiction.

R.C. 3314.024 does not mention jurisdiction at all. It certainly says nothing limiting the Court's authority over the claims about contracts, property, grant conditions, or the delegation of governmental decision making. Those matters thus fit comfortably within the Court's R.C. 2305.01 jurisdiction and are not carved out under the rules set by *BCL* and *Black*.

Nor does R.C. 3314.024 restrict jurisdiction over Plaintiffs' accounting claim. Although it does mention accounting, there are two reasons why it does not affect jurisdiction.

First, R.C. 3314.024 does not abrogate jurisdiction over the Schools' contractual claim to an accounting. Common pleas jurisdiction over contract claims is not divested by the fact that the defendant is also subject to other regulatory authority. For example, in *Southgate Development Corp. v. Columbia Gas Transmission Corp*. (1976), 48 Ohio St. 2d 211, a party filed a contract action in common pleas court against a utility regulated by PUCO and a federal agency. The case involved actions also regulated by those bodies, and the utility argued that they had exclusive jurisdiction over the case. The Supreme Court disagreed because "[t]he determination of questions of construction or validity, together with the declaration of rights, status or other legal relations under such contracts, by Common Pleas Courts is specifically authorized by Ohio Rev. Code Ann. § 2721.03." *Id*. at 215.

The same pattern is present here. Like the utility in *Southgate*, White Hat entered into contracts requiring action (financial disclosures) that are also subject to regulation (AOS review under R.C. 3314.024). As in *Southgate*, the contracts independently require actions that could to some degree also be reviewed by the AOS under R.C. 3314.024:

- White Hat must work with the Schools' fiscal officers to prepare a budget for approval by the governing authority. *Management Agreement*, attached as Ex. A hereto, at p. 3, ¶ 2 (c)(.ii). How can the Schools budget if they don't know what goods and services have historically cost? White Hat has exclusive possession of information, and this provision requires White Hat to share it with the Schools.

- White Hat must coordinate and cooperate with advisors engaged by the governing authority, including attorneys and accountants. *Id*. at p. 3, ¶ 2(c)(viii). That contractually requires White Hat to provide the financial data requested by the Schools' counsel.

- White Hat must prepare quarterly financial disclosures ~~"d~~etailing the Company's expenditures at the School required by … state and federal law. *Id*. at p. 4, ¶ 2(e)(i). That contractually obligates White Hat to provide much of the information required by R.C. 3314.024:

    - The Schools are corporations organized under R.C. Chapter 1702, and R.C. 1702.15 requires such corporations to keep ~~"c~~*omplete* books and records of account" (emphasis added). That requires an explanation of how more than 96% of their funds were spent, White Hat is the only source of that information, so it must share it if the Schools are to meet this obligation.

    - The Schools are required to maintain their financial records in the same manner as such records are maintained by other public school districts. R.C. 3314.03(A)(8); *see also* Adm. Code. 117-02-01, 117-02-02. How can the Schools meet this requirement if access to financial information is denied to them?

    - The Schools' grants require compliance with 34 C.F.R. §§ 80.20, and 80.32. Those regulations require the Schools to maintain records that allow tracing of grant funds, records that detail what property was purchased (down to the serial number), the dates it was purchased, its location/condition, and details of any dispositions of the property. §§ 80.20(a)(2) and (6); § 80.32(d); ODE MSJ, Ex. B, p.1, ¶ 3, and p. 10, Conds. 36 and 37. White Hat has that information and the agreements require that it be turned over to the Schools.

- White Hat must provide annual school facility reports including budgets for capital improvements and purchases of equipment. *Ex. A hereto* at p. 4, ¶ 2(e)(iv). As is true of operating budgets, this requires knowledge of historic costs, White Hat has exclusive possession of that information, so this provision requires White Hat to provide that data.

- White Hat must provide lists of school and company owned property. *Id.* at p. 5, ¶ 2(e)(xviii).

- White Hat "shall be responsible and accountable to the School's Board of Directors and to the School's sponsor on the Board's behalf for the administration, operation and performance" of the schools. *Id.* at pp. 7-8, ¶ 4. These Schools receive millions of dollars each year and more than 96% of that money flows to White Hat. The Schools cannot meaningfully evaluate White Hat's administration, operation, or performance unless they are provided with detailed information on how that money was spent. The contracts require White Hat to provide that information.

- The Schools may purchase property owned by White Hat and used in the Schools at the "remaining cost basis" of the property. *Id.* at pp. 9-10, ¶ 8(a)(i). That requires information on the purchase dates and prices. Once again, White Hat has exclusive possession of that information, so this provision requires White Hat to provide that data.

Hence, as in *Southgate,* R.C. 2721.03 gives the Court jurisdiction to construe the foregoing contract provisions, regardless of the AOS' authority over White Hat.

Second, R.C. 3314.024 does not limit jurisdiction over the Schools' equitable claim to an accounting. As discussed above, the Supreme Court requires explicit statutory language before finding an abrogation of otherwise existing jurisdiction, *BCL, supra; Black, supra*. Consistent with that approach, the Court has repeatedly held that a new statute will not eliminate a pre-existing equitable remedy unless the legislature clearly expresses that intent. *Morris v. Investment Life Ins. Co.* (1966), 6 Ohio St. 2d 185, 189 ("As a general rule, equitable remedies are not displaced by the enactment of statutory procedures unless the legislative intention to supplant them is manifestly clear,"); *Lyons v. American Legion Post Realty Co.* (1961), 172 Ohio St. 331, syllabus 4 ("Where a statute gives a new remedy and does not in terms impair or deny a remedy already recognized by law, such statutory remedy is merely cumulative, and either the new or the old remedy may be employed at the option of the party seeking redress."); *State ex*

rel. Cleveland v. Court of Appeals (1922), 104 Ohio St. 96, 103 ("The question is not a new one … this court [has] held: A new remedy provided by statute for an existing right, where it neither denies an existing remedy nor is incompatible with its continued existence, should be regarded as cumulative, and the person seeking redress may … pursue either").

R.C. 3314.024 nowhere mentions accounting requirements flowing from fiduciary relationships. That equitable remedy has a very long history and Ohio courts have long had jurisdiction to grant that relief. See generally, *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 442. That effect therefore cannot be read into R.C. 3314.024.

b. R.C. Chapter 3314 does not divest courts of jurisdiction over community schools.

White Hat's broad assertion that R.C. Chapter 3314 divests the courts of jurisdiction over matters involving community schools cannot be squared with either the statutes or the cases.

Several statutory provisions rebut the argument that courts lack jurisdiction over disputes related to community schools. R.C. 3314.01(B)—the very statute White Hat relies upon as authority for its contracts—provides that "[a] community school may sue and be sued[.]" How can that be reconciled with the absence of jurisdiction over suits about those contracts? Further, R.C. 2744.01, 3314.07(E) and 3314.071 provide community schools, sponsors and some individuals involved with community schools with immunities from civil liability, including contractual liability. Why were those provisions enacted if no court has jurisdiction over community school matters?

White Hat's sweeping jurisdictional argument is also rebutted by the cases. Courts at all levels have decided cases concerning various aspects of community school operations without any doubt about their jurisdiction. See e.g. *State ex rel. Nation Bldg. Tech. Acad. v. Ohio Dep't of Educ.*, 123 Ohio St. 3d 35, 2009-Ohio-4085 (closure procedures); *Hope Acad. Broadway*

Campus v. State Dep't of Educ. (10th Dist.), 2008-Ohio-4694 (composition of governing authorities); *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Educ.* (Ct. of Claims), 163 Ohio Misc. 2d 10, 2011-Ohio-886 (school grade ranges); *Harmony Cmty. Sch. v. Ohio Dep't of Educ.* (Ct. of Claims), 125 Ohio Misc. 2d 42, 2003-Ohio-5312 (amounts due schools); *Harmony Community—Cincinnati v. Ohio Dept. of Education* (Nov. 20, 2008), Franklin Co. C.P. Case No. 08CVH09-12593 (audit findings against school) (attached as ex. B hereto). Indeed, White Hat was a party to one of those cases and never quibbled about jurisdiction, but instead sought affirmative relief. *Hope Acad. Broadway Campus v. State Dep't of Educ.* (Aug. 2, 2008), Franklin Co. C.P. Case No. 07CVH03-4388, at pp. 3, 9 (attached as ex. C hereto). The proposition that courts have no jurisdiction to determine community school's legal rights cannot be reconciled with those authorities—or White Hat's own actions.

3. R.C. Chapter 117 does not abrogate jurisdiction.

a. R.C. Chapter 117 does not give the Auditor authority to adjudicate the matters at issue.

Controlling precedent establishes that the AOS cannot adjudicate the claims presented here. In *Ohio Fresh Eggs, LLC v. Boggs* (10th Dist.), 183 Ohio App. 3d 511, 2009-Ohio-03060, the court set out several principles for determining whether an administrative body can decide claims normally decided by the courts. One is that an ~~"a~~gency has no authority beyond the authority given to it by statute," and ~~"e~~an only exercise those powers which are expressly conferred upon it by the Ohio General Assembly." *Id*. at ¶¶ 10, 18. Another is that when ~~"c~~onstruing a grant of administrative power from a legislative body, the intention of that grant of power, as well as the extent of the grant, must be clear, and, if there is doubt, that doubt must be resolved against the grant of power." *Id.* at ¶19. A third is that ~~"c~~ourts are without authority to create jurisdiction when the statutory language does not." *Id*. at ¶ 20. The Tenth District applied

those principles to hold that an agency could not decide an issue usually assigned to the courts (awarding attorney fees) because there was no statutory authorization for that action.

Those principles establish that the AOS has no authority to adjudicate the claims pressed here. Its powers and duties are set out in R.C. Chapter 117. That chapter does not mention resolving disputes between an audited entity and third parties. It does not authorize the AOS to enter declaratory judgments or grant injunctive relief. It grants no authority to adjudicate conflicting claims to property, declare the validity of delegations, or enforce fiduciary duties. There is no statutory authority for the AOS to conclusively resolve the claims presented here.

Those realities undermine White Hat's assertion that the declaratory relief sought here is barred by the supposed existence of a ~~"s~~pecial statutory proceeding." The Supreme Court defines such proceedings as adjudicatory proceedings, and has held that investigations that simply result in reports for another body to prosecute do not preclude declaratory relief. *State ex rel. Taft v. Court of Common Pleas* (1992), 63 Ohio St.3d 190, 195. The Tenth District likewise holds that a specialized statutory proceeding is one that takes ~~"t~~he form of an *adjudicatory* hearing." *Arbor Healthcare Company v. Jackson* (10th Dist. 1987), 39 Ohio App.3d 183, syllabus 2 (emphasis added). The AOS does not conduct adjudications as that term is commonly understood. There are no charges, no pleadings, no hearings. Instead, as in *Taft*, the AOS conducts investigations (audits) and issues reports that other offices may enforce. R.C. 117.28, 117.29, 117.36. There is therefore no special proceeding barring declaratory relief.

b. A public body can enforce its rights without a finding under R.C. 117.28.

Bringing the matter into sharper focus, the courts have repeatedly held that a public body can take action to enforce its rights without a finding under R.C. 117.28. The Franklin County Court of Appeals has held that "[n]othing in R.C. Chapter 117 prohibits [a public body] from attempting to secure the return of funds [the public body] itself found to have been illegally expended." *White v. Columbus Bd. of Education* (10th Dist. 1982), 2 Ohio App. 3d 178, 180 (emphasis added). Another appellate court has held that "R.C. 117.28 does not appear to provide the only means by which a [public body] may recover funds. ***considering that R.C. 117.28 is to be liberally construed in order to protect and safeguard public moneys, we agree … that R.C. 117.28 is not the only means by which a [public body] may recover improper expenditures." *Gibbs v. Greenfield Exempted Vill. Sch. Dist. Bd. of Educ.* (4th Dist.), 2001-Ohio-2638, 2001 Ohio App. LEXIS 6016 at **22-23 (attached as Ex. D). Accord, *State v. Johnson* (6th Dist.), 1981 Ohio App. LEXIS 13540 at **7-8 (attached as Ex. E). *Green Local Teachers Assn. v. Blevins* (4th Dist. 1987), 43 Ohio App. 3d 71, 74. One of this Court's magistrates has similarly concluded that "R.C. 117.28 does not state or infer [] exclusivity." *Harmony Community—Cincinnati v. Ohio Dept. of Education* (Nov. 20, 2008), Franklin Co. C.P. No. 08CVH09-12593, p. 12 (attached as ex. B). Those specific precedents are consistent with the Supreme Court's more general instruction that public bodies have the option of choosing between the R.C. 117.28 and other remedies when seeking to protect public money. *State ex rel. Smith v. Maharry* (1918), 97 Ohio St. 272, 279 (construing G.C. 286, the predecessor to R.C. 117.28).

B. There is no practical reason to decline jurisdiction.

Not only is there no legal barrier to the Court exercising jurisdiction, there is no practical problem with its continuing to do so. That is true on two levels.

1. There is no possibility of a conflict with the Auditor because the Auditor has never made a finding about compliance with R.C. 3314.024.

Factually, there is no AOS finding this Court's judgment could contradict. The audits are silent on compliance with R.C. 3314.024. They do not address either of the two separate duties that statute imposes (White Hat's duty to account to the Schools or the Schools' duty to disclose their dealings with White Hat). Indeed, every one of the audits expressly disclaim rendering an opinion on compliance with ~~l~~laws … which could have a direct and material effect on the determination of financial statement amounts." *Audited Financial Statements for the Year Ended June 30, 2010 and for Period Ended July 20, 2010, Hope Academy Broadway Campus*, p. 34[1] R.C. 3314.024 is such a law. Further, the AOS has stated that, on a general level, it was ~~u~~unable to express, and [did] not express an opinion on" any aspect of the Schools' last two financial statements. *Id*. at p. 34.[2] That precludes any conflict about compliance with R.C. 3314.024.[3]

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[1] Available at http://www.auditor.state.oh.us/auditsearch/Reports/2011/Hope_Academy_Broadway_Campus_10_Cuyahoga.pdf The page number cited in the text is to the PDF pagination of the document posted on the AOS' website, rather than it internal pagination. Identical language is in each audit for each of the Schools for each fiscal year since the Management Agreement were signed. That statement is found in the ~~I~~Independent Accountants' Report on Internal Control Over Financial Reporting and On Compliance and On Other Matters Required by Government Accounting Standards" section. It can usually be reached through the ~~C~~Compliance Section" book mark.

[2] The page number cited in the text is to the PDF pagination of the document posted on the AOS' website. Identical language is in each audit for each of the Schools for the two most recent fiscal years covered by the AOS' website. It is found in the AOS' cover letter.

[3] The Auditor's Bulletin 2004-009 (~~A~~AB 04-09") does not alter that. As noted above, R.C. 3314.024 sets forth two separate duties – the duty of the management company to account to the

2. None of the claims pressed here challenge or implicate an audit finding.

Legally, none of the claims made here challenge anything done by the AOS.

Plaintiffs' accounting claim seeks something that is qualitatively distinct from an audit. An audit is an independent review, by the Auditor or a designee, of the school's financial statements, books and records. R.C. 117.01(G). The scope of the audit is established by agreement and accounting standards adopted by the Auditor of State. R.C. 117.11, 117.12, 117.19. An audit primarily serves two purposes: (1) to confirm that the school prepares financial reports and maintains records in accordance with accounting standards and Ohio law; and (2) to deter and, often, discover, using random testing, whether public monies have been illegally expended or are unaccounted for. R.C. 117.11(A); 117.28.

An accounting has a more specific, and subjective, purpose: to inform a principal about how its fiduciary has managed the principal's specific affairs. It enforces a fiduciary's duty ~~to~~ the exercise of the utmost good faith and loyalty," *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440. The nature of that task requires a more subjective analysis. It therefore involves more than fixing a bottom line figure, but also examines *how* the fiduciary managed his principal's affairs. See e.g. *Restatement (Second) of Agency* (1958), § 382, cmt. A (~~T~~The agent's duty ordinarily includes not only the duty of stating … the amount that is due, but also a duty of keeping an accurate record of the persons involved, of the dates and amounts of things received, and of

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school and the duty of the school to account to the public. AB 04-09 addresses only the second duty, and requires the school to summarize its financial transactions with a management company through a footnote to its financial statements. AB 04-09 at 1 (~~"~~[C]ertain community schools using management companies are now required to more fully disclose accounting information regarding the nature and costs of services provided by those companies."). The only manner in which AB 04-09 touches on the duty of the management company to the school is to specify that the Auditor ~~"~~will examine the books, records, and other supporting documentation prepared and maintained by the management company" during the school's audit. Nothing in this directive can be read to limit the contractual and common law claims brought in this case.

payments made"). *Restatement (Third) of Trusts* (2007), § 83 ("A trustee has a duty to maintain clear, complete, and accurate books and records regarding … the administration of the trust"). An accounting would serve many purposes here, including informing the School's boards of how its monies are expended so that the boards can (1) fulfill their statutory duty to maintain properly detailed records; (2) comply with their contracts with the schools' sponsors; and (3) set appropriate policies for the schools.

In short, audits and accountings are different things. An audit is to an accounting as an affidavit is to a deposition; both may address the same ultimate facts, but a deposition will address those facts in more detail and from differing perspectives.

None of the other claims implicates any audit finding. Neither ODE nor Plaintiffs ask the Court to review any audit finding and none of their claims implicates any finding. They seek legal declarations about the validity of contract provisions and the title to property. None of the AOS' audits opine on the merits of those disputes and, as discussed at pp. 10-11 above, those matters are outside the AOS scope of authority. There can therefore be no conflict on those matters.

CONCLUSION

Controlling precedent establishes that "the court of common pleas is a court of general jurisdiction. It embraces all matters … not denied to it." *BCL Enters. v. Ohio Dep't of Liquor* Control (1997), 77 Ohio St. 3d 467, 469. That precedent also recognizes that "when the General Assembly has intended to abrogate the subject-matter jurisdiction of Ohio courts in particular types of actions it has done so expressly." Id. at 471. None of the statutes involved in this case mentions, let alone abrogates, jurisdiction. Further, there is no possible conflict with the AOS; it has not opined on anything at issue here. This case should go forward.

Respectfully Submitted,
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Attorney for the Ohio Department of Education

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing will be forwarded to the following persons via e-mail and regular U. S. Mail, postage prepaid, this 5th day of December, 2011:

James D. Colner
Shumaker, Loop, & Kendrick
Suite 2400
41 South High Street
Columbus, OH 43215

Charles Saxbe
Chester, Wilcox, & Saxbe
65 East State Street
Columbus, Ohio 43215

TODD R. MARTI

MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT ("Agreement") is entered into effective as of November 1, 2005, by and between HA Broadway, LLC , a Nevada limited liability company ("Company") and HOPE Academy Broadway Campus, an Ohio non-profit corporation which is governed by its Board of Directors (hereinafter "Board" or "School").

W I T N E S S E T H:

WHEREAS, the School is organized as a community school under Chapter 3314 of the Ohio Revised Code (the "Code"); and

WHEREAS, the School has entered into a Community School Contract (the "Contract") with the Ohio Council of Community Schools ("OCCS") and the University of Toledo Board of Trustees ("UT Board")(the "Sponsor"); and

WHEREAS, the School desires to implement the HOPE Academy Educational Model as described in Exhibit 4 to the Contract, (hereinafter the "Educational Model") and has elected to hire the Company to do so.

NOW, THEREFORE, in consideration of their mutual promises and covenants, and intending to be legally bound hereby, the parties hereto agree as follows:

1. Term. This Agreement shall begin on November 1, 2005 and continue until June 30, 2007 unless terminated for cause by either Party. Thereafter this Agreement shall renew for consecutive one year terms through June 30, 2010 unless terminated for cause by either Party.

2. Contract. The School hereby contracts with the Company, to the extent permitted by law, to provide the School all functions relating to the provision of the HOPE Academy Educational Model and the management and operation of the School in accordance with the terms of the Contract, except for the School accounting, financial reporting and audit functions which will be performed by the designated fiscal officer hired by the Board. The Company will assume all financial risk associated with the day-to-day operation of the School, except as otherwise set forth herein. The Company shall provide the School the following services in accordance with the Contract subject to the approval of the School's Board of Directors where indicated:

a. School Facility:

i. The School will be located at 3398 East 55th Street, Cleveland, Ohio 44127 ("School Facility") and during the term of this Agreement such location shall be used only to carry out the terms and conditions of the Contract, educational purposes not inconsistent with the Contract and

MANAGEMENT AGREEMENT

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other uses which the Board may approve of in writing, such approval not to be unreasonably withheld. Following the expiration of any contracts to provide vending machines at the School Facility (copies of which contracts shall be provided to the Board within thirty (30) days following the execution of this Agreement), no vending machines or other revenue generating activities shall be carried on at the School unless authorized by the Board of Directors, except for revenue generating activities carried on by the School's Parent Teacher Organization (if any);

ii. Upon the recommendation of the Company and subject to approval by the Board of Directors, which approval shall not be unreasonably withheld, the Company may increase or decrease the size of the School Facility or move the School Facility to another location by leasing or purchasing a suitable facility for the School's operations as defined in the Contract; and

iii. The Company shall annually present to the Board of Directors a Capital Improvements Plan for the School and shall execute said Plan as it relates to the School's physical plant layout, maintenance and capital improvements as needed for the School's operations and the safety, health and welfare of the School's students. In addition to what the Company may list on the Capital Improvement's Plan, the School may request such other items which are necessary to legally provide for the health and safety of the School and its students.

b. Equipment:

i. The Company shall purchase or lease all furniture, computers, software, equipment, and other personal property necessary for the operation of the School. Additionally, the Company shall purchase on behalf of the School any furniture, computers, software, equipment, and other personal property which, by the nature of the funding source, must be titled in the School's name.

c. Education Management and Consulting:

i. Provide day-to-day management of the School, in accordance with the terms of the Contract, the non-profit purpose of the School and subject to the direction given by the School's Board of Directors;

ii. Work with the Board's designated fiscal officer, the Board Treasurer and Finance Committee Chair in preparation of the budget required by the Contract for submission to the Board of Directors for approval;

iii. Consulting and liaison services with the School's Sponsor, the Ohio Department of Education and other governmental and quasi-governmental offices and agencies as directed by the Board;

iv. Advisory services regarding special education and special needs students, programs, processes and reimbursements;

v. CSADM and EMIS monitoring, consultation and ongoing compliance with OEDS-R, CSADM and EMIS requirements;

vi. Drafting of operations manuals, forms, parent student handbooks, and management procedures, as the same are from time to time developed by the Company and as approved or requested by the Board of Directors;

vii. Assist the Board of Directors in identifying and applying for grants and cooperate with any grants consultant separately engaged by the Board of Directors;

viii. Coordination and cooperation with other Advisors engaged by the Board of Directors including but not limited to attorneys, accountants, auditors, educational consultants and diversity consultants;

ix. Development and maintenance of records in the formats the Company reasonably understands are necessary to comply with the Contract and the annual audit conducted by the Auditor of State;

x. Annual preparation or update of a Strategic Plan for the School in consultation with the Board of Directors; and

xi. Such other reasonable management and management consulting services as are from time to time requested by the Board of Directors and mutually agreed upon by the School and the Company in writing, including but not limited to attendance at Board of Directors meetings as requested.

d. Technology and Operational Support Services:

i. Acquisition of technology and systems;

ii. Integration of technology with curriculum;

iii. Ongoing teacher training with respect to technology;

iv. Advice on admissions and expulsion procedures, including utilization of forms and systems;

v. Student assessment and quality data tracking, tying together all school data as the Company's system is developed;

vi. Training of employees, including the School principal, teachers and assistants through the services of the Company's professional and curriculum development staff;

vii. Access to Company supply sources to obtain centralized purchasing discounts where applicable and available;

viii. The Company shall continue to evaluate the economics of placing a computer in the home of every student and making available for students at home an appropriate internet connection and training parents on the use of technology so that parents can motivate and assist their children with their use of technology; and

ix. Such other technology support services as are from time to time requested by the Board and mutually agreed upon in writing.

e. The Company shall report to the Board of Directors on the following:

i. Preparation of quarterly un-audited and annual audited financial disclosures detailing the Company's expenditures at the School in the format required by AOS Bulletin 2004-009 and other state and federal laws and the Contract. The annual audited financial disclosures detailing the Company's financial expenditure at the School shall be provided to the Board on or before October 31 following the close of the fiscal year;

ii. Compliance with the Contract and the No Child Left Behind Act (NCLB) and Ohio laws related to student achievement and performance following the administration of each test or site visit;

iii. Performance of students enrolled at the School for two or more years (Longevity Study);

iv. Annual School Facility report including budgets for capital improvements and purchases of equipment;

v. The results of all tests administered to the students including but not limited to any nationally normed tests and the results of other standardized tests required pursuant to the Contract with OCCS;

vi. Implementation of diversity initiatives including the number and dollar value of contracts awarded to vendors under the Company's supplier diversity program;

vii. Results of parent and other surveys;

viii. Periodic reports on student performance, subject to the laws governing individual confidentiality;

ix. Annual update of the School's strategic plan as set forth in the Educational Plan;

x. Teacher retention and turnover;

xi. Student retention and turnover;

xii. Student Teacher ratio;

xiii. The percentage of students who have taken tests required by NCLB or the State of Ohio;

xiv. Attendance;

xv. Expulsions and suspensions;

xvi. Copies of all communications from the Ohio Department of Education's Office of Community Schools and the Sponsor that specifically involve the School;

xvii. Graduation Rate, where applicable;

xviii. List of Property owned by the Board and upon request of the Board a list of property owned by the Company or one of its affiliates and used in the operation of the School; and

xix. Additional Reporting required by the Contract.

f. Attendance and Academic Standards. It is the goal of the School to exceed the attendance and academic standards as set forth in Exhibit 5 to the Contract. In order to promote the academic success of the School's students in every academic subject, the Company shall research and obtain or develop curriculum aligned with Ohio's academic content standards and representing "best practices" in each academic subject.

g. Student Recruitment. The Company shall be responsible for the recruitment of students subject to general recruitment and admission policies stated in the Contract or as approved by the Board of Directors. Students shall be selected in accordance with the procedures set forth in the Contract and in compliance with the Code and other applicable law.

3. Personnel and Training.

a. Personnel Responsibility . All personnel necessary to implement the Educational Model shall be employed by the Company.

In addition to all of the duties assumed by the Company pursuant to Section 2 above, and subject to the Contract, except as otherwise provided herein, the Company shall also have the responsibility and authority to determine staffing levels, and to select, evaluate, hire, assign, discipline, transfer and terminate personnel, consistent with state and federal law, provided, however, the Company shall promptly inform the Board of major personnel changes and shall respond promptly to Board inquiries regarding any such personnel changes.

Company agrees to indemnify and defend the School in connection with any liability it may incur as a result of any claim brought against the School by any Company employee, or any employee employed by an affiliate of the Company, which results from the negligence, recklessness or intentional misconduct of the Company or Company affiliate.

b. School Principal. The Company will have the authority, consistent with state law, to select and supervise the School Principal and to hold him or her accountable for the success of the School. The employment contract with the School Principal, and the duties and compensation of the School Principal shall be determined by the Company, and shared with the Board of Directors upon request. The Company will share on a confidential basis with the Board of Directors its performance reviews and assessment of the Principal and shall provide prior notice of the transfer or dismissal of the Principal.

c. Teachers. The Company shall determine the number of teachers and the applicable grade levels and subjects required for the operation of the School. The Company shall employ such teachers qualified in the grade levels and subjects required, as are required by the state and federal law and the Contract. The curriculum taught by such teachers shall be the curriculum set forth in the Contract or as otherwise approved by the Board of Directors. The Company shall work with each teacher to develop an Individualized

Teaching Plan focused on professional growth and development and on increasing student achievement. Such teachers may, in the discretion of the Company, work at the School on a full or part time basis.

d. Support Staff. The Company shall determine the number and functions of support staff, as are required for the operation of the School. The Company shall employ such staff. Such support staff may, in the discretion of the Company, work at the School on a full or part time basis.

e. Personnel Compensation. The Company shall employ and compensate the personnel who perform services at the School under the Educational Model. If the Company fails to pay said compensation, the School, in its sole discretion, may pay such compensation and offset the amount by withholding an equal amount from the fees owed to the Company under this Agreement. For purposes of this Agreement, compensation shall include salary, fringe benefits, state and federal tax withholdings and retirement programs pursuant to the Ohio Revised Code ("Code").

f. Training. The Company's Education Team shall continuously improve its teaching methodologies to reflect "best practices" in all subject areas and shall provide training in its methods, curriculum, program, and technology to all teaching personnel on a regular and continuous basis. The Company shall continue its tuition reimbursement program for educators who qualify. Non-instructional personnel shall receive such training as the Company determines to be reasonable and necessary under the circumstances.

g. The School's Board of Directors strongly believes that a strong Education Team is the backbone of the Company and may, within its sole discretion financially support the recruitment of nationally known educators to fill vacancies on the Education Team should they arise.

h. During the term of this Agreement, the Company and the School's Board of Directors shall discuss and consider creating a Professional Development Center to foster additional training for educators at all levels.

4. Responsibility. In providing services required by this Agreement, the Company must observe and comply with all applicable federal, state and local statutes, and the Articles of Incorporation of the School, including, but not limited to, the requirement that the School maintain tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1986, in the event such status has been obtained. The Company shall be responsible and accountable to the School's Board of Directors and

to the School's Sponsor on the Board's behalf for the administration, operation and performance of the School.

5. Diversity Program. The Company or an affiliate involved in the support or operation of the School shall adhere to the Board's Diversity Policy set forth in Exhibit A attached hereto and shall engage a nationally recognized diversity consultant to develop for the Company a comprehensive and proactive diversity program which shall focus on hiring senior level executives, managers and school administrators and outside consultants and which shall include a specific process for reporting on the Company or an affiliate involved in the support or operation of the School's internal hiring performance as it relates to diversity as well as the Company or an affiliate involved in the support or operation of the School's performance as it relates to the use of diverse vendors and suppliers.

6. Insurance and School Responsibilities.

a. The Company. The Company shall comply at the Company's expense with the insurance requirements set forth in the Contract and shall maintain, at Company's expense, such commercial general liability insurance and other insurance required by the Contract, other than Directors and Officers insurance, which shall be maintained by the Board. The Company's policies shall name the School and the other parties mentioned in the Contract as the insured, or as an additional insured on a Company policy, in an amount not less than one million dollars ($1,000,000.00) per occurrence and five million dollars ($5,000,000.00) aggregate and excess umbrella liability insurance of not less than ten million dollars ($10,000,000.00) per occurrence and fifteen million dollars ($15,000,000.00) aggregate, or such other amounts and coverages agreed to by the School's Sponsor. Each such policy shall name the School as an insured or an additional insured and a certificate of insurance specifying same shall be provided within thirty (30) days of the execution of this Agreement. All such policies of insurance required to be maintained by Company shall be by responsible companies of recognized standing authorized to do business in the jurisdiction where the Company is performing services and shall be written in standard form and shall provide that the policies shall not be cancelable except upon thirty (30) days written notice to the School. Upon the School's request, the Company shall deliver to the School a copy of such policies and other written confirmation acceptable to School, together with evidence that the insurance premiums have been paid.

b. The School. The School will be responsible for its directors' and officers' insurance, legal fees for the representation of the Board of Directors general corporate matters, accounting, audit, tax and consulting fees for the School and other expenses approved by the Board of Directors.

c. Notice of Claims. The Company shall notify the Board of Directors about any claim or potential claim involving the School or any students, parents, teachers, principals or their supervisors. On any claim arising out of the intentional, reckless or negligent conduct of the Company or its employees, the Company shall pay the deductibles on all Company and Board owned insurance policies.

7. Authority. The Company shall have authority and power necessary to undertake its responsibilities described in this Agreement except in the case(s) wherein such power may not be delegated by law.

8. Fees.

a. Management, Consulting and Operation Fee. The School shall pay a monthly continuing fee (the "Continuing Fee") to the Company of Ninety Six Percent (96%) of the revenue per student received by the School from the State of Ohio Department of Education pursuant to Title 33 and other applicable provisions of the Ohio Revised Code (the "Code") plus any discretionary fees paid under the Discretionary Bonus Program identified in Paragraph 8.c. (the "Qualified Gross Revenues"). Qualified Gross Revenues do not include: Student fees, charitable contributions, PTA/PTO income and other miscellaneous revenue received which shall be retained by the School or PTA/PTO. Federal Title Programs, lunch program revenue and such other federal, state and local government grant funding designated to compensate the School for the education of its students shall be fully paid to the Company. The Continuing Fee shall be paid within five (5) business days of receipt by the School from the Department of Education or other applicable funding sources subject to annual reconciliation based upon actual enrollment and actual revenue received (including the final month of the term, even though the payment may be made beyond expiration of the term).

i. Payment of Costs. Except as otherwise provided in this Agreement, all costs incurred in providing the Educational Model at the School shall be paid by the Company. Such costs shall include, but shall not be limited to, compensation of all personnel, curriculum materials, textbooks, library books, computer and other equipment, software, supplies, building payments, maintenance, and capital improvements required in providing the Educational Model. It is understood that at the School's election, upon termination of this Agreement all personal property used in the operation of the School and owned by the Company or one of its affiliates and used in the operation of the School, other than proprietary materials owned by the Company, may become

the property of the School free and clear of all liens or other encumbrances upon the School paying to the Company an amount equal to the "remaining cost basis" of the personal property on the date of termination. The "remaining cost basis" of such personal property shall be calculated based upon the straight line method of depreciation over the life of such property, as established by the following property classifications: computers and software, three (3) years; furniture, fixtures and textbooks, five (5) years; buildings or leasehold improvements, twenty (20) years. Depreciation will begin on the date that each item of personal property was acquired by the Company. In the event that School purchases the personal property it must purchase all of said personal property, except any proprietary materials, and must also exercise the School's Option to Lease the School Facility pursuant to Section 12 (b).

ii. Property Owned by the School. The property purchased by the School shall continue to be owned by the School. The Company shall permanently mark or tag with a number any property owned by the School in accordance with School policy and keep an inventory of said property.

b. Grants. The Company, from time to time hereafter, and with the prior approval of the Board of Directors may apply for available grants in the name of the School which will (A) provide additional funding to the School, (B) aid the School in fulfilling the terms of the Contract and/or (C) provide additional services and programs to the students.

Prior to the application for any grant funds, the Board of Directors shall review and approve any grant application including any fees to be paid to the Company. Any contracts to be awarded in the name of the Board of Directors shall be issued pursuant to the Diversity Policy attached hereto as Exhibit A and pursuant to any other grant requirements. Following the expenditure of said grant funds, the Board of Directors shall direct and participate in any audit of said funds and the Company shall provide to the School any information requested which bears upon the audit.

Within five (5) business days following the School's receipt of funds from the Department of Education or other applicable funding source all Continuing Fees payable hereunder shall, be made via electronic funds transfer following the presentation of an invoice by the Company. Following the School's receipt of Title and other Grant funds, said funds shall be payable to the Company upon a reimbursement basis (unless otherwise allowed by such grants) and payment to the Company shall occur within five (5) business days following submission of invoices, receipts or other

documentation of past, present or planned expenditures by the Company together with a certification that the services provided or items purchased for which reimbursement is sought were done in accordance with the terms and conditions of the application, grant and any related State or Federal laws or regulations. The School and its designated fiscal officer shall cooperate with the Company to set up and establish necessary accounts and procedures such that the School shall automatically transfer the funds received from the State when such funds are immediately available in the School's accounts.

c. Discretionary Bonus Program.

The School, in its sole discretion, may pay annually to the Company a bonus up to One Percent (1%) of the revenue per student received by the School from the State of Ohio Department of Education pursuant to Title 33 of the Ohio Revised Code. The School shall consider semiannually whether to pay any such bonus.

9. Additional Programs. The services provided by the Company and the School under this Agreement consist of the educational program during the school year and school day, and for the age and grade level of students as set forth in the Contract, as such school year, school day, and age and grade level may change from time to time. The School and the Company may decide to provide such additional programs as may be mutually agreed upon by the School and the Company.

10. Termination by the School for Cause. Except as otherwise provided herein, the School may terminate this Agreement in the event the Company materially breaches this Agreement or the Contract and the Company does not cure said material breach within sixty (60) days of its receipt of written notice from the School, unless said breach cannot reasonably be cured within said sixty (60) day period, in which case, the Company shall promptly undertake and continue efforts to cure said material breach within a reasonable time. Material Breach, without limitation, shall include:

a. The Company, or an affiliate involved in the support or operation of the School files for bankruptcy or has a bankruptcy suit filed against it which is not dismissed within ninety (90) days, is insolvent, ceases its operations, admits in writing its inability to pay its debts when they become due or appoints a receiver for the benefit of its creditors.

b. Termination of the Community School Contract by the School or the School's then current Sponsor.

c. Failure to meet any of the material terms of the Contract.

d. Failure to maintain the insurance coverages as described above.

e. Failure to pay any employee compensation when due as described above.

f. The parties agree in writing to terminate the Agreement.

g. In the event the Company assigns this Agreement, to any entity other than an affiliate, the School may terminate this Agreement at the end of the then-current term of this Agreement on or before June 30th of that then-current term.

h. After June 30, 2007, the School may terminate this agreement at the end of any fiscal year in which the School's student population fails to meet the gains required by Sections 3314.35 and 3314.36 of the Code and any regulations promulgated thereunder.

11. Termination by the Company. Except as otherwise provided herein, the Company may, at its option, terminate this Agreement in the event that the School materially breaches this Agreement, and the School does not cure said material breach within sixty (60) days of its receipt of written notice from the Company, unless said breach cannot reasonably be cured within said sixty (60) day period, in which case, the School shall promptly undertake and continue efforts to cure said material breach within a reasonable time. Material Breach, without limitation, shall include:

a. The School files for bankruptcy or has a bankruptcy suit filed against it which is not dismissed within ninety (90) days, is insolvent, ceases its operations, has its Contract terminated or not renewed, admits in writing its inability to pay its debts when they become due or appoints a receiver for the benefit of its creditors.

b. The parties agree in writing to terminate the Agreement.

c. The School fails to pay any fees due to the Company within (10) business days of receiving written notice that such fees are overdue, excluding overdue payments resulting from a payment dispute between the School and any funding entity.

d. The School's assignment or attempted assignment of this Agreement without the prior written consent of the Company.

e. Termination of the Community School Contract by the School or the School's then current Sponsor.

f. As permitted by the Contract, a five percent (5%) reduction from the preceding fiscal year in the sum of all government funding paid on a per pupil basis excluding any reduction in funding originating from the Federal Government as a result of the School's failure to meet the requirements of NCLB.

12. Duties Upon Notice of Termination and Termination.

a. Continuing Services and Payments. Unless otherwise agreed in writing by the parties, in the event the School receives notice from its then current Sponsor of the Sponsor's intention to terminate the School's Community School Contract, the parties agree to continue School operations through the end of the School year or June 30th, whichever date is sooner ("Termination Date"); provided that the School continues to make the payments provided for in Section 8. In the event any reconciliation takes place after the Termination Date, any right or payment or repayment shall survive the termination or expiration of this Agreement. In the event that this Agreement is terminated during an academic year, the Company shall not impede the School's continuation of the academic year.

b. Option to Lease. Upon payment to the Company of two (2) months rent and other relevant monthly facility costs, including, but not limited to, utilities, insurance and maintenance, for sixty (60) days following the Termination Date, the Company shall keep the lease for the School's facility in effect for the purposes of allowing the School to evaluate its desire to lease all or part of the School Facility upon the same terms and conditions as the Company or in the event that Company owns such facility, rent shall be based upon the fair market value as determined by an independent appraiser. In the event that the School does desire to Lease the School facility, the Company shall use its best efforts to assist the School in its attempt to obtain an assignment of the Lease. If such an assignment does occur, then any leasehold improvements installed and paid for by the Company or its affiliates for the School Facility, which were not included in the rent paid by the Company for the School Facility, shall be treated as personal property and the School shall pay to the Company the "remaining cost basis" of such property, based upon the calculation methodology included in Section 8(a)(i), herein, on or before the date of such assignment less any start-up or developmental grants received pursuant to Section 8 and which were applied for said leasehold improvements. In the event that the School shall elect to exercise its option to lease the School facility it shall also purchase and lease (to the extent such leases are assignable) the personal property as set forth in Section 8(a)(i).

c. Equipment and Personal Property. On or before the Termination Date, and after the payment of the "remaining cost basis" to be made by the School in accordance with Section 8 (a), herein the Company shall transfer title to the School, or assign to the School the leases (to the extent such leases are assignable), for any and all computers, software, office equipment, furniture and personal

property used to operate the School, other than the Company's proprietary materials. Other than said proprietary materials, the School shall own said personal property and the rights under any personal property lease assigned from the Company to the School. The Company warrants and represents that during the term of this Agreement, all assets used to educate students on a daily basis shall remain at the School's Facility; provided, however, this provision shall not be construed to prohibit the replacement or substitution of assets with assets of the same or better quality. In the event that this Agreement terminates, nothing herein shall prohibit the School from contacting, recruiting and hiring the teachers, staff and principals employed by the Company at the School.

13. Indemnification. Except as otherwise stated in this Agreement, the School agrees to indemnify, defend and hold harmless the Company from any loss, cost, expense, obligation, liability, fee (including, but not limited to reasonable attorney fees) or other expenditures incurred by the Company as a result of any claims, actions or lawsuits brought against the Company as a result of the negligence, recklessness or intentional misconduct of the School or breach of this Agreement by the School. Likewise, except as otherwise stated in this Agreement, the Company agrees to indemnify, defend and hold harmless the School from any loss, cost, expense, obligation, liability, fee (including, but not limited to reasonable attorney fees) or other expenditures incurred by the School as a result of any claims, actions or lawsuits brought against the School as a result of the negligence, recklessness or intentional misconduct of the Company or breach of this Agreement by the Company. This indemnification provision shall survive the termination of this Agreement.

14. Relationship of the Parties. The parties hereto acknowledge that their relationship is that of an independent contractor. No employee of either party shall be deemed an employee of the other party. Nothing contained herein shall be construed to create a partnership or joint venture between the parties.

15. No Third Party Beneficiaries. This Agreement and the provisions hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third person, nor shall this Agreement be deemed to confer or have conferred any rights, express or implied, upon any third person.

16. Captions. Paragraph captions are used herein for reference only and are not intended, nor shall they be used, in interpreting this instrument.

17. Notices. Any notices to be provided hereunder shall be in writing and given by personal service, mailing the same by United States certified mail, return receipt requested, and postage prepaid, facsimile (provided a copy is sent by one of the other permitted methods of notice), or a nationally recognized overnight carrier, addressed as follows:

If to the Company, to:	HA Broadway, LLC 600 Key Building 159 South Main Street Akron, Ohio 44308 Attention: President Facsimile: 330-535-5037
With a copy to:	Mark E. Krohn, Esq. White Hat Management 600 Key Building 159 South Main Street Akron, Ohio 44308 Facsimile: 330-535-5037
If to the School, to:	Robert C. Townsend, III, President 6100 Richmond Road Oakwood Village Ohio 44146 Facsimile: 440-735-1794
With a copy to:	Mr. Arthur L. Clements, III Nicola, Gudbranson & Cooper, LLC 25 West Prospect Ave., Suite 1400 Cleveland, Ohio 44115 Facsimile: 216- 621-3999

18. Severability. The invalidity or unenforceability of any provision or clause hereof shall in no way effect the validity or enforceability of any other clause or provision hereof.

19. Waiver and Delay. No waiver or delay of any provision of this Agreement at any time will be deemed a waiver of any other provision of this Agreement at such time or will be deemed a waiver of such provision at any other time.

20. Resolution of Disputes; Arbitration. In the event that a dispute arises among the parties, they agree to appoint a mediator mutually agreeable to both parties to help resolve the dispute. The parties agree to resolve by arbitration any dispute that cannot be mediated. Following mediation, an arbitration may be started by one party serving upon the other a written demand for arbitration together with the name of the party's arbitrator. The opposing party shall respond in writing within fourteen (14) days by naming that party's arbitrator. The two arbitrators shall meet immediately and shall name a third arbitrator. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), then in effect, unless the parties mutually agree otherwise; provided, however, that, the Arbitration shall not be administered by AAA but shall be subject to the reasonable control of the arbitrators as to manner and time. The arbitrators shall conduct any arbitration in Summit County, Ohio and shall apply Ohio law without regard to its conflict of laws principles. Notwithstanding any AAA rules, the parties shall have the right to

utilize those means of discovery available to litigants under the Ohio Rules of Civil Procedure and, subject to the consent of the Arbitrators, which consent shall not be unreasonably withheld, may present testimony of witnesses by way of deposition or other electronic means. The cost of the arbitration shall be borne equally by the Parties, provided however, that the arbitrators shall have the power and authority to award attorneys fees and the cost of arbitration to the prevailing party. In the event that either party shall refuse to respond within thirty (30) days to the demand for arbitration or otherwise refuse to arbitrate, the party demanding arbitration may, upon Notice to the other party, present that party's case to one or more arbitrators for decision and the arbitration award shall include an award of costs and attorneys fees against the non participating party.

21. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

22. Assignment; Binding Agreement. Neither party shall assign this Agreement without the written consent of the other party, which consent shall not be unreasonably withheld or delayed; provided, however, that the Company may assign this Agreement to a similarly situated and qualified affiliate without the consent of the School so long as such an assignment would not invalidate the School's community school contract with the Sponsor. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

23. Counterparts. This Agreement may be executed in several counterparts, with each counterpart deemed to be an original document and with all counterparts deemed to be one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have set their hands by and through their duly authorized officers as of the date first above written.

SCHOOL:
HOPE Academy Broadway Campus

By: _____

Its: President

COMPANY:
HA Broadway, LLC

By: _____

Its: _____

Exhibit A

BOARD OF DIRECTORS' DIVERSITY POLICY

WHEREAS: The Board of Directors believe that community involvement in services contracted to WHLS of Ohio, LLC., (WHLS) will result in the construction of excellent educational facilities and that community involvement in all portions of contracted services will best assure the achievement of that result. This Diversity Policy will require WHLS to make Good Faith Efforts (as defined below) to partner with the community in which a Hope Academy or Life Skills Center ("School") resides to develop and implement fair and effective programs for achieving diversity and local participation in procured and/or contracted services (hereinafter referred to as "Service Projects").

WHEREAS: The Board of Directors believe that management of the Schools should foster professional growth and diversity by blending professionals that bring the highest level of talent and resources to operate the schools. In achieving this goal, this Diversity Policy will require WHLS to engage in the practice of diverse employment in the hiring of senior level executives, managers and school administrators and outside consultants. The Board of Directors and WHLS will work together to build a diverse work force that reflects the diverse population of students and parents at the Schools for which it serves.

Further, The Board of Directors have established a Diversity Policy for the purpose of:

(a) maximizing the involvement of residents in the Public School District in which the School is located to participate in Service Projects;

(b) expanding employment opportunities for students and graduates of the Hope Academies and Life Skills Centers; and,

(c) promoting the participation of minority business enterprises (MBE's), female business enterprises (FBE's) and disadvantaged business enterprises (DBE's) in providing services in connection with the Schools.

(d) developing a comprehensive and proactive diversity program within WHLS which shall focus on senior level executives, managers and school administrators and outside consultants.

Good Faith Efforts are defined as follows:

A. WHLS' cooperation with the Board of Directors' diversity efforts to engage a nationally recognized diversity consultant and WHLS' recruitment efforts with respect to minorities and women in upper level management positions within its workplace;

B. WHLS compliance with the requirement to make Good Faith Efforts to locate and

engage the services of bidders of businesses in connection with construction projects and other procured services. WHLS will demonstrate that it has complied with this requirement by certifying to the Board of Directors, in writing, that as of the date of any bid submittal; that,

i) WHLS has selected and engages the services of an MBE, FBE, DBE or a local residents in providing services on behalf of the Hope Academies and Life Skills Centers, in which case the certification shall include:

(a) the names and addresses of those enterprises engaged by WHLS;

(b) the value of the contract and;

(c) a description of the work on the project to be performed by such firm(s), companies and/or individuals; or,

(ii) if despite the WHLS' Good Faith Efforts, it is not able to select and engage the services of such enterprises, WHLS shall include in its written certification, the following:

(a) affirmation that, prior to determining that it was unable to locate MBE, FBE and DBE business that WHLS consulted local business registries including those identified by the Board of Directors.

(b) a copy of written notifications sent to MBEs FBE's and DBE's soliciting their interest in being a contractor or supplier on a given project.

President, Board of Directors

D8460 - 047

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Harmony School – Cincinnati
dba Harmony Community,

CASE NO 08CVH09-12593

Plaintiff,

JUDGE FAIS

-vs-

MAGISTRATE THOMPSON

Ohio Department of Education, et al ,

Defendants

MAGISTRATE'S DECISION ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Rendered this 20th day of November, 2008

THOMPSON, MAGISTRATE

Pursuant to Civil Rule 53 and Local Rule 99 02, this case was referred to this Magistrate for a hearing on Plaintiff's Motion for Preliminary Injunction, scheduled for the 14th day of October, 2008, at 1 30 p m See *Order of Reference*, dated September 4, 2008

On the assigned hearing date, counsel for Plaintiff and Defendants appeared It was jointly conveyed to the Magistrate that the referred matter primarily involves legal issues, and while the parties are aware that an opportunity has been provided by the Court for an evidentiary hearing, such a forum is unnecessary Rather, counsel relied upon a Joint Stipulation containing uncontested facts agreed by the parties, which was filed with the Court on the date of the hearing *Joint Stipulation of Facts*, dated October 14, 2008 Additionally, counsel were in agreement that the Magistrate should consider the filings previously submitted concerning injunctive relief, as well as allow for an opportunity to offer supplemental briefs germane to this issue

The Magistrate was amenable to this proposition and a briefing schedule was imposed in

(19)

the presence of a court reporter and with the participation of the parties A review of the record reflects that Plaintiff filed its Preliminary Injunction Brief on October 20, 2008 Defendants responded by submitting their Second Memorandum Contra on October 27, 2008 Plaintiff replied on November 3, 2008 Each of these filings were timely and in accordance with the aforementioned briefing schedule It should be noted that Defendants subsequently offered a Submission of Supplemental Authority on November 13, 2008, but this has been stricken from the record by this Magistrate

FINDINGS OF FACT

On September 3, 2008, Plaintiff Harmony School – Cincinnati, dba Harmony Community (hereinafter "Plaintiff" or "Harmony") initiated this action by filing a Verified Complaint seeking declaratory and injunctive relief *Id* at Counts 1-2 On the same day, this Court issued a temporary restraining order prohibiting Defendant Ohio Department of Education (hereinafter "ODE") from taking any steps to implement a repayment schedule set forth in a correspondence to Plaintiff dated August 26, 2008, and/or making any deductions from Plaintiff's monthly payments due for students enrolled at Harmony, until a hearing take place on Plaintiff's application for injunctive relief The Court contemporaneously ordered an evidentiary hearing on Plaintiff's Motion for a Preliminary Injunction and referred the matter to the undersigned Magistrate for that purpose

The instant action arises from Plaintiff's attempt to declare its rights in response to recent actions by ODE to recoup funds paid to Plaintiff as a consequence of an audit conducted by the Auditor of State (hereinafter "AOS" or "Auditor"), dated August 5, 2008 (hereinafter "Audit Report") Harmony is a community/charter school located in Hamilton County, Ohio and sponsored by Buckeye Hope Community Foundation This classification allows it to obtain a

§501(C)(3) designation from the IRS, as an Ohio non-profit corporation As a community school, Harmony receives payment of public funds through ODE on a per-student basis from aid calculated for the traditional school distinct where the student would have attended public school

In conjunction with the AOS's responsibility to conduct regular audits of all public offices, an audit of the financial statements of Harmony was conducted for the year ending June 30, 2005 The resulting Audit Report concluded that Plaintiff was overpaid in the amount of $2,440,033 00 In relying on these findings and by written correspondence dated August 26, 2008, ODE instructed Harmony that it would commence recovery of this sum via payment deductions over the next twenty-two months *Verified Complaint, Exhibit C*

Plaintiff responded by initiating this action and seeking a preliminary injunction to maintain the status quo during the pending adjudication of its request for declaratory judgment Based on the Second Count of its Verified Complaint, Plaintiff prays that the Court prohibit ODE from engaging in its planned "self-help deductions" from Plaintiff's ongoing monthly payments for students enrolled at Harmony without first instituting, prosecuting, and prevailing in a civil action, pursuant to R C 117 28 Plaintiff also included the AOS as a party-defendant, although the Auditor did not participate in opposing the request for a preliminary injunction

On October 9, 2008, ODE filed an Answer and Counterclaim/Petition for Judgment on Findings for Recovery Defendant's Petition requests that the Court dismiss Plaintiff's claims and grant judgment, pursuant to R C 117 28, against Harmony for the amount included in the August 5, 2008 Audit Report

In its briefs addressing injunctive relief, Plaintiff asserts that ODE's self-help plan for recovery is not supported by statute or rule It is the contention of Harmony that the Audit Report is

not self-executing or controlling, and that any findings therein must be enforced by the affected agency or the Attorney General through the act of instituting a civil action in the proper court under R C 117 28 Plaintiff insists that ODE's conduct is an unlawful end-around the statute and as such, it deprives Harmony of its due process rights to challenge the findings of the AOS According to Plaintiff, R C 117 28 requires a final determination in a civil action before ODE can take any action to collect public money predicated on the AOS's determinations

Plaintiff claims that although the Audit Report establishes findings for recovery of $2,620,995 00, ODE currently seeks a lesser amount of $2,440,033 00 Harmony maintains that such a reduction qualifies as executive action to "abate or compromise" the AOS's findings, and without approval by the Attorney General, this acts as a violation of R C 117 33 Next, Plaintiff refers to a separate lawsuit involving these parties in *Hamilton County Common Pleas Court State ex rel Marc Dann v Harmony Community School et al* , Case No A-0800620 (hereinafter "Dann case") Plaintiff contends that under the doctrine of judicial estoppel and its position in a companion to the Dann case, Case No A-0605150, ODE is precluded from denying the accuracy and correctness of ODE's funding to harmony during school years 2005 through 2007 Plaintiff also indicates that ODE has violated the requirements of R C 3314 08(O) by not issuing any report of findings to Harmony

Shifting to the AOS, Plaintiff alleges that the Auditor erroneously failed to give credit for actual hours documented by Harmony for each of the various educational programs identified Plaintiff claims that the AOS failed to distinguish between "learning opportunities" and "actual seat time", and under the standards employed by the AOS, even traditional schools would fail, thereby bringing education to a halt For Harmony's Transitional, Plus, and ACE programs, Plaintiff

contends that AOS did not provide specific enough information of how it arrived at its findings or how Harmony could respond For each program, Plaintiff represents that it should not be penalized for the entire 920 hours of learning opportunities Additionally, Plaintiff asserts that any findings related to fiscal years 2006 and 2007 are outside the scope of the audit, which is limited to the period ending June 30, 2005

It is Plaintiff's position that unless the Court intervenes by imposing a preliminary injunction, it will suffer irreparable harm Given the monthly payment deductions as outlined by ODE, Harmony claims that it will be forced to cease its operations, thereby forcing the school's students to enroll elsewhere This is said to result in job loss, interruption of educational opportunity, and costs to students According to Harmony, an injunction will not harm non-parties to these proceedings Moreover, Plaintiff reasons that the public interest is served through the requested preliminary injunction, as a sudden influx of 320 students will impose a hardship on the Cincinnati Public School District

In response, Defendant ODE argues that as the moving party, Plaintiff must produce clear and convincing evidence that it is likely to prevail on the merits and that an injunction is in the public interest Because ODE acts on behalf of the State Board of Education, it emphasized that this burden of proof is even greater in higher education cases As background, ODE outlined what it characterized as a history of mismanagement by Plaintiff This includes the following criticisms of Harmony (1) inadequate control of disbursements, fixed assets, and payroll, (2) Plaintiff's books being declared unauditable for four separate fiscal years, (3) the longstanding failure of Plaintiff's Board to monitor the financial activity of the school, (4) unpaid judgments/insolvency, (5) public funding being diverted to improper purposes, and (6) a failure to correct problems after they were

identified by the AOS Focusing on the recent Audit Report, ODE insists that the AOS determined that the aforementioned problems have continued, and Harmony still has inadequate records, is unable to secure its fixed assets, inadequately controls its payroll, inadequately controls its disbursements, improperly diverts public funds, and its Board failed to correct the pattern of ignoring the school's finances It was stressed that Plaintiff is presently insolvent and has a negative net worth of $459,802 00

ODE avers that it has already initiated a counterclaim/petition seeking judgment under R C 117 28 Moreover, Defendant claims that controlling precedent authorizes it to withhold funds from Harmony and Plaintiff's argument regarding the breadth of R C Chapter 117 is unfounded In its supplemental brief, Defendant indicates that the case authority submitted by ODE on this issue has never been rebutted by Harmony and Plaintiff's arguments to the contrary are merely conclusory Next, ODE insists that it has been clear that it seeks full recovery of all amounts included in the Audit Report, and any prior mention of a lesser amount or portion was solely based on an internal error In addition, Defendant claims that as a political subdivision, Harmony receives no constitutional due process protection, and even if it did or in the alternative, Plaintiff was given no less than seven opportunities to present its views on these matters

With respect to waiver or estoppel, ODE argues that neither is applicable First focusing on the Dann case, Defendant points out that in order for judicial estoppel to apply, judicial action or acceptance must first occur In this instance, ODE submits that any argument of this nature is limited to discovery and disclosure between the parties to that case, which resulted in no judicial action Moreover, ODE points out that Plaintiff has failed to provide evidentiary support that Defendant actually approved these records, and the deposition testimony of Harmony's principal

establishes that ODE never inspected Plaintiff's records or otherwise made approval. Secondly, Defendant asserts that R.C. 3314.08(O) is textually inapplicable as well, because the underlying determination did not originate from ODE, but rather, is based on findings from the AOS. It is also suggested that the doctrines of waiver and estoppel are not viable in the setting of governmental agencies.

Responding to any suggestion that the Audit Report is limited to a single year, ODE claims that R.C. 117.11(A) includes no such limitation and state auditors are not bound by federal law in this arena. Next, Defendant argues that Plaintiff's attempt to challenge the AOS's findings as to learning opportunities is misplaced, as Harmony was required to document that it offered, and its students received, 920 hours of learning opportunities. ODE insists that Plaintiff stipulated that it can't do so and that concession runs contrary to the Ohio Revised and Administrative Code. Regarding any argument that the AOS has set a risky precedent for traditional schools, Defendant states that such standards do not apply, as traditional schools utilize a "snap shot" method for funding.

ODE maintains that an award of an injunction is not in the public interest, as this would allow for the payment of tax dollars to an insolvent and mismanaged entity that already owes the public hundreds of thousands of dollars. According to Defendant, granting Plaintiff's motion would expose the public to the very real risk that tax dollars wouldn't be used for their intended purpose, as the evidence establishes that Harmony does an atrocious job of managing public resources and has a long history of letting such resources be diverted to improper purposes, which most recently is shown by funds and students being used to build a deck on its principal's home. Finally, ODE claims that any so-called public or third party risk of displaced students has been

dispelled by the stipulation that the Cincinnati City School District can accommodate Plaintiff's students if the community school was to close Defendant represents that said public school district has a far better track record in educating students than Harmony, as corroborated by school ratings, proficiency tests, and graduation rates

As indicated in the above summary, a Joint Stipulation of Facts was submitted as the sole means of evidentiary and factual support to assist this Magistrate in making a recommendation on the pending motion Consequently, the October 14, 2008 Joint Stipulation, along with the Uncontested Facts contained therein, is hereby incorporated into this decision and the Magistrate's factual findings The Joint Stipulation, *inter alia*, establishes the following

> 8 [***] There is no documentation that students participating in the Transitional, Plus, or ACE programs could receive 920 hours of learning opportunities through those programs alone All students enrolled in the Transitional, Plus, or ACE program had the opportunity to take additional classes Some of the students in the Transitional, Plus, or ACE programs did participate in the traditional classes and the [AOS] gave Harmony credit for the learning opportunities provided to those students in the traditional classes when calculating the amount of findings 2005–002, 2005-003, and 2005-004 made in the Audit [Report] The [AOS] did not give any credit for any time any students spent in the Transitional, Plus, or ACE programs and the findings for recovery are for the full amount the state paid for those students' time spent in those programs
>
> 9 Because of Plaintiff's disorderly maintenance of its record-keeping system during the Audit Period, Plaintiff was not and is not able to produce records proving that all students enrolled by Plaintiff during the relevant periods actually received a full 920 hours of learning opportunities
>
> 10 Some of Plaintiff's students do not receive 920 hours of learning opportunities tarring the Audit Period and all relevant time periods related to this litigation
>
> 12 Plaintiff has and had a negative net worth, and the ODE's

proposed plan of recovery for the amounts set forth in its letter will, if deducted from Plaintiff's Foundation Payments, effectively close Plaintiff

14 The letter attached as [Exhibit A] to Plaintiff's Complaint is an expert witness disclosure filed in the [Dann case] [***] The Court presiding over the [Dann case] has taken no action based on that disclosure

15. The Cincinnati City School District could accommodate those Harmony students that reside in Cincinnati's territory if Harmony were to close [***]

20 Plaintiff does not contest the findings made in Audit Report for the Fiscal The year Ended June 30, 1999, Audit Report for the Fiscal Year Ended June 30, 2000, Audit Report for the Fiscal Year Ended June 30, 2001, Audit Report for the Fiscal Year And it June 30, 2002, Audit Report for the Fiscal Year Ended June 30, 2003, Audit Report for the Fiscal Year Ended June 30, 2004

Id Lastly, it is stipulated that the deposition testimony of Michael Ashmore and Deland McCullough, as well as the Appendix to Petition for Judgment, has been filed with the Court and is admitted into evidence *Id* at ¶¶19-21

CONCLUSIONS OF LAW

In determining whether to grant a preliminary injunction, a court must consider the following factors

(1) whether there is a likelihood that the plaintiff will prevail on the merits of its claims,

(2) whether the plaintiff will suffer irreparable harm if the injunction is not granted,

(3) whether third parties will be unjustifiably harmed if the injunction is granted, and

(4) whether the public interest will be served if the injunction is granted

Vanguard Transportation Systems, Inc v Edwards Transfer & Storage Co (1996), 109 Ohio App 3d 786, 790 Moreover, the party seeking injunctive relief must establish a right to the preliminary

injunction by showing clear and convincing evidence of each element of the claim *Id* at 790, citing *Mead Corp v Lane* (1988), 54 Ohio App 3d 59

Upon review, the Magistrate observes that the vast majority of the facts in this case are uncontroverted and not presently in contention between the parties Regarding the first recognized factor for preliminary injunction consideration, the Magistrate determines that the logical starting place is the gateway question of whether the statutory scheme put in place by the legislature precludes ODE from pursuing its proposed method of recouping public funds

Ohio community/charter schools provide non-traditional public education to students from kindergarten through grade twelve and are enabled through Chapter 3314 of the Ohio Revised Code *Greater Heights Academy v Zelman* (2008), 522 F 3d 678, 679 Community schools are financed solely through state educational funds diverted from traditional Ohio public school districts and awarded on a per-pupil basis *Id*, R C 3314 08 The ODE functions as the state administrative unit and organization through which the policies, directives, powers of the state board of education and the duties of the superintendent of public instruction are administered As the chief inspector and supervisor of public offices in Ohio, the AOS is authorized and obligated to conduct regular audits of all public offices R C 117 01, et seq As part of that duty, the AOS determines whether any public money has been illegally expended, any public money collected has not been accounted for, any public money due has not been collected, or any public property has been converted or misappropriated R C 117 24 The AOS then compiles an audit report, which includes such findings R C 117 25

Presently in dispute is the interaction between ODE and the AOS, and more specifically, whether R C 117 28 provides an exclusive remedy to ODE and consequently, requires a final

determination or judgment in a civil action before ODE can take any steps to collect public money predicated on the AOS's determinations R C 117 28 provides the following

> Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report pursuant to section 117 27 of the Revised Code may, within one hundred twenty days after receiving the report, institute civil action in the proper court in the name of the public office to which the public money is due or the public property belongs for the recovery of the money or property and prosecute the action to final determination
>
> The auditor of state shall notify the attorney general in writing of every audit report which sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated and of the date that the report was filed
>
> Within one hundred twenty days after receiving the certified copy of the report, the officer receiving the report shall notify the attorney general in writing of whether any legal action has been taken If no legal action has been taken, the officer shall, within the same period, notify the attorney general in writing of the reason why legal action has not been taken The attorney general or his assistant may appear in any such action on behalf of the public office and may, either in conjunction with or independent of the officer receiving the report, prosecute an action to final determination The attorney general may bring the action in any case where the officer fails to do so within one hundred twenty days after the audit report has been filed

In no uncertain terms, this section codifies a means or forum for an officer of a respective state board, department or agency to maintain a civil suit to recover public money R C 117 36 also provides that a certified copy of any portion of the state auditor's report containing factual information is prima facie evidence in determining the truth of the allegations in a petition under R C 117 28 *State, ex rel Holcomb v Walton* (1990), 66 Ohio App 3d 751 Prima facie evidence

is that which is sufficient to carry the case to the trier of fact and, if unrebutted, to support a conclusion in favor of the plaintiff *Cleveland v Keah* (1952), 157 Ohio St 331

In its numerous filings in this action, Plaintiff solely relies on the wording of the statute in adducing that this functions as the only viable collection option available to ODE Unfortunately, R C 117 28 does not state or infer such exclusivity Moreover, appellate courts interpreting R C 117 28 and its statutory predecessor, R C 117 10, have opined to the contrary After recognizing that R.C 117 28 is a remedial statute that should be construed liberally, the Fourth District Court of Appeals reasoned that it "does not appear to provide the only means by which a board of education may recover funds" *Gibbs v Greenfield Exempted Village School District Board of Education* (2001), Highland App No 01CA8, 2001 Ohio 2638, at 22-23 Rather, the *Gibbs* court concluded that the school board in that case was entitled to recover improper expenditures through other means, in order to uphold the legislative purpose of protecting and safeguarding public moneys *Id*; See also *State, ex rel Holcomb v Walton, supra* at 756

The Tenth District Court of Appeals has similarly authorized self-help or unilateral deductions under these circumstances *White v Columbus Board of Education* (1982), 2 Ohio App 3d 178 Upon examining R C 117 10, the *White* Court determined that "[n]othing in R C Chapter 117 prohibits [the Board] from attempting to secure the return of funds [the Board] found to have been illegally expended" *Id* at 180 The Court added that the provision "does not prohibit self-help by the pertinent board or officer, but simply requires prior approval of the Attorney General in situations involving abatement or compromise of the relevant funds" *Id* However, the current statutory provision contained in R C 117 28 no longer contains language of Attorney General approval of abatement or compromise Nevertheless, it has been found that R C 117 28

does not preclude self-help or unilateral deductions of this nature *Green Local Teachers Association v Blevins* (1987), 43 Ohio App 3d 71 Even the Supreme Court of Ohio has authorized measures outside of a pending civil action for the recovery of public funds and allowed agency withholdings in the interim *Looker v State, ex rel Dillian* (1933), 127 Ohio St 413

After applying the aforementioned authority to the instant action, the undersigned Magistrate is obligated to determine that the current position of the ODE is not contrary to Ohio law or violative of R C 117 28

Another aspect of demonstrating success on the merits requires an examination of Plaintiff's challenges to the findings included in the Audit Report In its briefs, Harmony suggests that the substance or findings of the audit itself is not at issue or is premature in the setting of injunctive relief This Magistrate disagrees, as a primary consideration under recognized case law requires the moving party to demonstrate likelihood of success Upon examination of the stipulated facts and exhibits, the Magistrate concludes that by its own admissions and failure to introduce credible evidence in opposition, Harmony falls far short of its high burden of proof in this respect As correctly articulated by Defendant, the uncontested evidence establishes that Plaintiff lacks the documentation to challenge the findings of the AOS as to learning opportunities available, along with student attendance Furthermore, with respect to the Transitional, Plus, or ACE programs, Plaintiff is unable to effectively rebut the finding by the AOS that these provided far less than the required 920 hours or that the resulting deficit was adequate supplemented by Harmony's traditional classes Based on its contractual obligations, as well the requirements of the Ohio Revised and Administrative Code, Plaintiff's averments are not well-taken

A number of additional and miscellaneous arguments, both procedural and substantive,

have also been raised by Harmony Defendant classifies these as mere "red herrings", while Plaintiff claims they are dispositive First, Harmony asserts that by allowing ODE to proceed in this manner deprives the school of its constitutional due process rights to contest the findings of the AOS The Fourteenth Amendment to the United States Constitution, as well as Section 16, Article I of the Ohio Constitution, ensures that no state shall "deprive any person of life, liberty, or property, without due process of law" The United States Sixth Circuit Court of Appeals recently had an opportunity to consider such due process rights as applied to Ohio community schools *Greater Heights Academy v Zelman* (Apr 18, 2008), 522 Fed 3d 678 After finding that community schools are political subdivisions of the state, as they bear many of the same institutional characteristics and are defined as such under statute, the court in Zellman concluded that community schools are barred from invoking the protections of the Fourteenth Amendment *Id* at 681 The Magistrate finds this case to be controlling on this issue and that no due process clause infraction can been shown by Plaintiff

Secondly, Plaintiff accuses ODE of taking executive action to "abate or compromise" the AOS's findings, and without approval by the Attorney General, this acts as a violation of R C. 117 33 As indicated above, this language was originally included in the statutory predecessor R C. 117 10, but is currently contained in R C 117 33 Accordingly, this requirement is still good law and applicable to ODE However, the record is devoid of any action by ODE to abate or compromise the findings of the AOS Instead, it appears that in a single correspondence, ODE inadvertently and/or erroneously designated a monetary amount lower than the AOS's findings This was quickly corrected and Defendant at no time has communicated a basis warranting abatement In the matter at bar, the pleadings submitted by ODE only reference the full AOS

amount, and nothing admitted into evidence suggests Defendant has ever sought a compromise See Defendant's *Counterclaim/Petition for Judgment*, at ¶68 and Prayer Consequently, this assertion is without factual support or at the very least, has been rendered moot

Thirdly, Plaintiff relies on the doctrine of estoppel to argue that ODE should be precluded from maintaining a position contrary to that in the Dann case and its companion It is also argued that Defendant's actions are estopped as being untimely under the mandates of R C 3314 08(O) The longstanding doctrine of estoppel has the purpose of preventing fraud and to promote the interests of justice . *Mark-It Place Foods, Inc v New Plan Excel Realty Trust, Inc* (2004), 156 Ohio App 3d 65; *Ohio State Bd of Pharmacy v Frantz* (1990), 51 Ohio St 3d 143, 145 Judicial estoppel lies in those instances where a party takes a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding *Greer-Burger v Temesi* (2007), 116 Ohio St 3d 324 The doctrine applies only when a party can show that an opponent (1) took a contrary position, (2) under oath in a prior proceeding, and (3) the prior position was accepted by the court Id at 330, citing *Griffith v Wal-Mart Stores, Inc* (C A 6, 1998), 135 F 3d 376, 380

As a preliminary matter, the Magistrate is guided by the substantial authority indicating that estoppel generally has no application as a defense against a governmental entity *Chevalier v Brown* (1985), 17 Ohio St 3d 61, *Besl Corp v Public Utilities Com* (1976), 45 Ohio St 2d 146, *Kimbrell v Seven Mile* (1984), 13 Ohio App 3d 443 Even if this longstanding principle did not exist, the given discovery responses and expert witness disclosure in the Hamilton County case fall short of raising a judicial estoppel argument In that case, the disclosed expert witness correspondence was not made under oath, which is necessary under *Greer-Burger v Temesi Verified Complaint*, Exhibit A More importantly, it has been stipulated that the required element

of acceptance by the Hamilton Court never took place *Joint Stipulation*, ¶14 Furthermore, the Magistrate is persuaded that estoppel does not bar the ODE from acting on the findings of the AOS, because R C 3314 08(O) is separate and apart from audit determinations authorized the Auditor and subsequently, enforced by the ODE Once the given Audit Report was released, there can be no argument that ODE responded in an immediate and timely manner, all within the interests of justice and without fraud As such, estoppel has not application

The fourth and final independent argument concerns the scope of the subject audit and Plaintiff's insistence that only a single year is allowed by statute, and the AOS improperly attached findings attributed to 2006-2007 R C 117 11(A) provides as follows

> Except as otherwise provided in this division and in sections 117 112 [117 11 2] and 117 113 [117 11 3] of the Revised Code, the auditor of state shall audit each public office at least once every two fiscal years The auditor of state shall audit a public office each fiscal year if that public office is required to be audited on an annual basis pursuant to "The Single Audit Act of 1984," 98 Stat 2327, 31 U S C A 7501 et seq , as amended In the annual or biennial audit, inquiry shall be made into the methods, accuracy, and legality of the accounts, financial reports, records, files, and reports of the office, whether the laws, rules, ordinances, and orders pertaining to the office have been observed, and whether the requirements and rules of the auditor of state have been complied with **Except as otherwise provided in this division or where auditing standards or procedures dictate otherwise, each audit shall cover at least one fiscal year** If a public office is audited only once every two fiscal years, the audit shall cover both fiscal years (Emphasis added)

The Magistrate concludes that Plaintiff's position relies upon an overly restrictive view of this provision The very wording of the statute indicates that one fiscal year is the minimum period contemplated in an audit and "each audit shall cover at least one fiscal year " Accordingly, three years' findings appears to be in compliance with R C 117 11(A) In the alternative, even if

Plaintiff can demonstrate that the AOS exceeded the scope of its authorized audit, the resulting findings nevertheless establish overpayment to Harmony of nearly $700,000 00 for the 2005 school year alone This finding by itself justifies the action of ODE, as established in its August 2008 correspondence

Based on all of the foregoing, this Magistrate finds that Plaintiff has failed to demonstrate by clear and convincing evidence a likelihood that it will prevail on the merits of its causes of action for declaratory judgment Although unnecessary, moving to the three remaining considerations for granting a preliminary injunction, the undersigned Magistrate is able to find that Plaintiff has established by clear and convincing evidence that it will suffer irreparable harm if the injunction is not issued With respect to the latter requirement, the party seeking injunctive relief has the burden of showing actual irreparable harm *Levine v Beckman* (1988), 48 Ohio App 3d 24, 27 Furthermore, it is axiomatic that in order to demonstrate harm that is irreparable, it must be of a category which cannot be compensable through traditional money damages *Cleveland v Assn of Employees* (1948), 84 Ohio App 43, *Campbell v Lake Wash Condo Bd of Managers* (Sept 20, 1996), Montgomery App No 15372, 1996 Ohio App Lexis 4130, *Carter v City of Fort Worth* (C A 5th, 1972), 456 F 2d 572 The Magistrate determines that after considering the evidence, Plaintiff's harm as alleged in its Verified Complaint is irreparable based on the fact that money damages are unavailable as full and complete remedy, and the consequence of denying injunctive relief appears to result in an untenable fiscal predicament for the school As stipulated, the failure to impose further injunctive relief will cause Harmony to close. which qualifies as resulting harm that is irreparable

As to the harm to third parties if the injunction is sustained, the Magistrate finds that

Plaintiff has identified several classifications of individuals that would be harmed if the Court declines to preserve the status quo By far the most significant is the effect that any adverse decision by the Court would have on the current student body It has been suggested that beyond any temporary inconvenience caused by having to transfer schools, departing students would suffer dire consequences or hardship because the Cincinnati City School District could not absorb such an influx However, the stipulation reached by the parties greatly mitigates these concerns, as it is presently undisputed that the public school district can accommodate incoming students in the event Harmony ceases to operate Balanced against the other respective concerns and in totality, the Magistrate finds less than clear and convincing evidence of harm to third parties

Lastly, the Magistrate concludes that the public interest as a whole would not be adversely impacted by the issuance of the injunction While it is true that community schools have been embraced in Ohio and many positive examples exist where non-traditional organization and experimental programs enrich the educational experience, this must be carefully balanced against the numerous improprieties at Harmony that have been established in the various audits by the AOS Taken together, there is an absence of clear and convincing evidence that public funds and tax payers' dollars are best utilized by perpetuating an admittedly insolvent and mismanaged community school as a going concern

DECISION

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is this Magistrate's decision that Plaintiff's request and corresponding motion for a preliminary injunction be denied Counsel shall prepare and submit an appropriate entry

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FINDING OF FACT OR CONCLUSION OF LAW IN THIS DECISION UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV R 53(E)(3).

MYRON A THOMPSON, MAGISTRATE

COPIES TO
James S Callender, Esq Attorney for Plaintiff
Todd R Marti, Esq , Attorney for Defendant
Robbin Shelton, Magistrates' Secretary

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

HOPE ACADEMY BROADWAY CAMPUS, et al.,	:	
Plaintiffs,	:	
vs.	:	Case No. 07CVH03-4388
OHIO STATE DEPARTMENT OF EDUCATION, et al.,	:	Judge Cain
Defendants.	:	

DECISION AND ENTRY DENYING IN PART THE STATE DEFENDANTS' MOTION FOR DISMISSAL AND SUMMARY JUDGMENT, FILED JUNE 4, 2007

DECISION AND ENTRY DENYING IN PART DEFENDANTS', CHARTER SCHOOL SPECIALISTS, LLC, ST. ALOYSIUS ORPHANAGE AND DAVID L. CASH, MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR MOTION FOR SUMMARY JUDGMENT, FILED JUNE 11, 2007

DECISION AND ENTRY DISMISSING PLAINTIFFS' SECOND CLAIM FOR RELIEF AND DEFENDANT'S, WHLS OF OHIO, LLC, COUNTERCLAIM TO DETERMINE THE CONSTITUTIONALITY OF R.C. 3314.026 FOR LACK OF STANDING

Rendered this 2nd day of August 2007.

CAIN, J.

This matter is before this Court on the State Defendants' Motion for Dismissal and Summary Judgment, filed June 4, 2007.[1] On June 11, 2007 Defendants, Charter School Specialists, LLC, St. Aloysius Orphanage and David L. Cash (hereinafter the "Charter Defendants"), filed a motion joining in the arguments

[1] The "State Defendants" consist of the State Board of Education, the Ohio Department of Education, the Superintendent of Public Instruction and the State of Ohio.

made in the State Defendants' motion.[2] Plaintiffs and the remaining Defendants filed their respective Memoranda in Opposition on June 25, 2007. The State Defendants, along with the Charter Defendants, filed their Reply Memoranda on July 9, 2007. These two motions are now ripe for decision.

The basic facts of this case are not in dispute. The present action revolves around the constitutionality of two Ohio Revised Code sections that recently went into effect on March 30, 2007. Plaintiffs consist of 19 community schools and the members of their governing boards. These community schools are better known throughout Ohio as charter schools. Charter schools are organized pursuant to a specific structure that is laid out by statute. They are run by governing boards that are overseen by what is known as a "sponsor". Sponsors are usually non-profit corporations/organizations organized pursuant R.C. 1702. The size and terms of service for the governing boards have traditionally been dictated by contract. They usually consist of nine members that serve three-year staggered terms. In order to run the day-to-day operations of the charter school, the governing board hires an "operator", such as Defendant, WHLS of Ohio, LLC (hereinafter "White Hat"). The rights and responsibilities of the operator in relation to the charter school as well as in relation to the governing board are dictated by contract.[3]

Prior to March 30, 2007 the relationships between the charter schools' sponsors, their governing boards and their operators ran smoothly, or at least as

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[2] The Charter Defendants' motion makes no arguments outside of those contained in the State Defendants' motion. Therefore, when the Court speaks of the State Defendants' motion, it is also speaking of the Charter Defendants' motion.

[3] Even though the sponsor, operator and the governing board have the freedom to contract, many of the rights and responsibilities of the sponsor, operator and the governing board are laid out in R.C. 3314.

smoothly as possible. Members of governing boards were permitted to sit on as many governing boards as they wished. Governing boards and operators were free to contract as to how and under what conditions the services of the operator could be terminated. These contract clauses many times included "no cause" clauses for termination of the operator as well as arbitration clauses to settle disputes. These contract clauses were all permitted under the law, but as of March 30, 2007 everything changed.

On March 30, 2007 two amendments to R.C. 3314 took effect that drastically affected the members of governing boards and altered their relationships with operators. These amendments were made pursuant to H.B. 79. R.C. 3314.02(E)(2) was amended so as to state that no one person can sit on more than two charter school governing boards at any given time.[4] R.C. 3314.026 was amended so as to drastically change the procedure by which the services of an operator can be terminated. It essentially provides the operator with a right to appeal if its services are terminated, regardless of whether such a right is conferred by contract.

Plaintiffs were obviously not enthralled with the changes to the law, which prompted them to file the present lawsuit. In their Complaint, Plaintiffs ask the Court for a declaration that both R.C. 3314.02(E)(2) and R.C. 3314.026 are in violation of the Ohio constitution. On April 9, 2007 White Hat filed an Answer and Counterclaim.[5] In their Counterclaim, White Hat asks the Court to make a declaration that both R.C. 3314.02(E)(2) and R.C. 3314.026 are not in violation of the Ohio constitution. Plaintiffs initially moved the Court for a temporary restraining

[4] It has been alleged that some of the individual Plaintiffs in this case sit on up to 17 governing boards.

order preventing the enforcement of R.C. 3314.02(E)(2) and R.C. 3314.026 against them. The Court denied this request. White Hat also moved the Court for a temporary restraining order preventing Plaintiffs from continuing to operate in violation of R.C. 3314.02(E)(2) and R.C. 3314.026. The parties reached an agreement as to this issue and the Court was not forced to make a decision.

All of this has brought the Court to the State Defendants' present motion. The State Defendants were named as defendants in this case pursuant to their interest in the constitutionality of R.C. 3314.02(E)(2) and R.C. 3314.026. They, however, dispute the fact that this case should even be before the Court. In their present motion, the State Defendants, as joined by the Charter Defendants, argue that R.C. 3314.02(E)(2) and R.C. 3314.026 cannot be applied retroactively and as such, the Court cannot determine their constitutionality in the context of the present fact scenario. Both Plaintiffs and the remaining Defendants, including White Hat, disagree with this and argue that the prospective application of R.C. 3314.02(E)(2) and R.C. 3314.026 is at issue and hence their constitutionality can be determined. The Court will now assess the appropriateness of the claims that are currently before it.

Before the Court addresses any of the State Defendants' arguments, it must first tackle the issue of standing. Standing is an issue that is ever present during a case and the Court has the power to *sua sponte* dismiss a claim for lack of standing. The basic law of standing was nicely summarized by the Ohio Supreme Court in the case of State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St. 3d 451. In its opinion, the Court held:

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[5] White Hat later amended its Counterclaim on May 4, 2007.

> It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue. *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St. 3d 318, 320, 643 N.E.2d 1088, 1089. The concept of standing embodies general concerns about how courts should function in a democratic system of government. As the court explained in *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13, 14, 51 Ohio Op. 2d 35, 257 N.E.2d 371, 372:
>
> "It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advise upon potential controversies. The extension of this principle includes enactments of the General Assembly."

Id. at 469.

In regards to the issue of standing, the Court is most concerned with the parties' claims as to the constitutionality of R.C. 3314.026. R.C. 3314.026 states:

> If the governing authority of a community school intends to terminate its contract with the school's operator prior to expiration or intends not to renew that contract upon expiration, the governing authority shall notify the operator of that intent. The operator may appeal the contract termination or nonrenewal to the school's sponsor, if the sponsor has sponsored the school for at least twelve months, or to the state board of education, if the sponsor has sponsored the school for less than twelve months. Upon appeal, the sponsor or state board shall determine whether the operator should continue to manage the school. In making its determination, the sponsor or state board shall consider whether the operator has managed the school in compliance with all applicable laws and terms of the contract between the sponsor and the governing authority entered into under section 3314.03 of the Revised Code and whether the school's progress in meeting the academic goals prescribed in that contract has been satisfactory. The sponsor or state board shall notify the governing authority and operator of its determination. If the sponsor or state board determines that the operator should continue to manage the school, the sponsor shall remove the existing governing authority and the operator shall appoint a new governing authority for the school. The new governing authority shall assume responsibility for the school

> immediately and shall exercise all functions assigned to it by the Revised Code or rule in the same manner as any other community school governing authority.

The Court does not dispute that this code section alters the provisions for termination of an operator found in most contracts between governing boards and operators. What the Court does dispute is that there is currently before it an actual case or controversy as to R.C. 3314.026 for the Court to decide.

As stated above, Ohio courts are not in the habit of issuing advisory opinions. There must be a concrete dispute between the parties in order for them to have standing to sue. In the present case, the parties believe they have a dispute concerning R.C. 3314.026. This, however, is just an illusion. While R.C. 3314.026 may alter contractual terms concerning termination, and the parties may dispute whether this is constitutional or not, these two things alone do not bring forth standing. To date, there has been no attempt, or allegation of such, to terminate White Hat from its position as operator of the relevant charter schools. In fact, White Hat admits this in its Memorandum Contra, on page 3, when it states: "Because no action has yet been taken to terminate the Management Agreements, R.C. 3314.026 can only apply prospectively." Therefore, to date, R.C. 3314.026 as amended has had no effect on the parties. The parties cannot sue based upon some future possibility, regardless of how concrete that possibility is. Until the services of White Hat are terminated, the parties have no standing to challenge the constitutionality of R.C. 3314.026. Plaintiffs' Second Claim for Relief and White Hat's Counterclaim concerning the constitutionality of R.C. 3314.026 must be dismissed.

This brings the Court to the issue of standing as to R.C. 3314.02(E)(2). R.C. 3314.02(E)(2) states:

> No person shall serve on the governing authorities of more than two start-up community schools at the same time.

It is the Court's opinion that the parties do have proper standing to bring a claim as to the constitutionality of this statute. In Plaintiffs' Complaint they allege that they received a letter from their sponsor stating that they felt R.C. 3314.02(E)(2) was applicable and would be applied against Plaintiffs. *See* Plaintiffs' Complaint at ¶¶36, 37. Further, in its Counterclaim, White Hat alleges that the individual Plaintiffs are in violation of R.C. 3314.02(E)(2) by their continued presence on more then two governing boards. This violation is in contravention of the law and creates a concrete dispute between the parties. Therefore, the parties have standing to challenge the constitutionality of R.C. 3314.02(E)(2).

This conclusion is best illustrated by looking at the effect on the parties a declaration of constitutionality, or unconstitutionality, of R.C. 3314.02(E)(2) would have. If R.C. 3314.02(E)(2) is declared constitutional, the individual Plaintiffs, along with the sponsors of the charter schools, will have to start the process of limiting the individual Plaintiffs to just two governing boards. This will most definitely affect the individual Plaintiffs due to the fact that some of them currently sit on up 17 governing boards. If R.C. 3314.02(E)(2) is declared to be unconstitutional, or at least unconstitutional as applied to the present facts and parties, the dispute over whether the individual Plaintiffs are acting in violation of the law by serving on more then two governing boards will be resolved. There is

proper standing as to this issue and both Plaintiffs' and White Hat's claim for a declaration of the constitutionality of R.C. 3314.02(E)(2) may proceed forward.

With this detour out of the way, the Court can now address the arguments presented in the State Defendants' motion. In their motion, the State Defendants' main argument is that the legislature did not intend R.C. 3314.02(E)(2) and R.C. 3314.026 to be retroactive in nature and they therefore cannot be applied to the parties presently before the Court. They argue that any application of R.C. 3314.02(E)(2) and R.C. 3314.026 to the parties would have clear retroactive effects, which is not permitted. As such, the State Defendants argue that R.C. 3314.02(E)(2) and R.C. 3314.026 cannot be applied to any of the parties and their constitutionality cannot be assessed. Due to the fact that the parties lack standing as to R.C. 3314.026, there is no need to address the State Defendants' arguments concerning it. The Court will only address the State Defendants' arguments as to R.C. 3314.02(E)(2).

The Court sees a lot of merit in the State Defendants' arguments. The reason for this is fairly simple. All of the parties to this action are in unanimous agreement that R.C. 3314.02(E)(2) is not retroactive in nature and that the legislature never intended it to be so. While the parties may agree, and allege, that R.C. 3314.02(E)(2) has no retroactive effect, that agreement is not binding on the Court. As argued by the State Defendants, R.C. 3314.02(E)(2) may still have a retroactive effect on the parties. If it is declared constitutional, R.C. 3314.02(E)(2) will essentially negate prior agreements and the expectations of the governing board members. Regardless of the stated intention of the

legislature, this is a retroactive effect that must be read into R.C. 3314.02(E)(2). This is an effect that will need to be addressed. It may be that R.C. 3314.02(E)(2) is constitutional as a whole, but unconstitutional as applied to Plaintiffs in the present situation. It may be that the individual Plaintiffs are allowed to serve the remainder of their respective governing board terms before R.C. 3314.02(E)(2) can be applied with full force against them. The Court, however, will hold off on any decision as to this matter.

Recently, both Plaintiffs and White Hat have filed motions for Summary Judgment in this matter. In them they have addressed some of the same issues addressed in the State Defendants' present motion. Before the Court will make a decision as to the constitutionality of R.C. 3314.02(E)(2), it will wait until all briefs of the parties are before it. Until then, the Court will hold off on any further decision on the present motion.

As a final matter, the Court must address why it is denying in part the State Defendants' and the Charter Defendants' motions. Since there is no standing to address the constitutionality of R.C. 3314.026, the arguments in the two current motions concerning it lack merit. As such, the portions of both the State Defendants' and the Charter Defendants' motions concerning R.C. 3314.026 must be denied.

After review and consideration, the Court rules as follows:

Defendants', State Board of Education, the Ohio Department of Education, the Superintendent of Public Instruction and the State of Ohio, Motion for

Dismissal and Summary Judgment is hereby DENIED IN PART in accordance with the above decision.

Defendants', Charter School Specialists, LLC, St. Aloysius Orphanage and David L. Cash, Motion for Judgment on the Pleadings and Motion for Summary Judgment is hereby DENIED IN PART in accordance with the above decision.

It is hereby ORDERED that Plaintiffs' Second Claim for relief and Defendant's, WHLS of Ohio, LLC, Counterclaim for a determination of the constitutionality of R.C. 3314.026 are hereby DISMISSED for lack of standing in accordance with the above decision.

IT IS SO ORDERED.

David E. Cain, Judge

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THOMAS GIBBS, Plaintiff-Appellant/Cross-Appellee,vs. GREENFIELD EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION, Defendant-Appellee/Cross-Appellant.

Case No. 01CA8

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, HIGHLAND COUNTY

2001 Ohio 2638*; *2001 Ohio App. LEXIS 6016

December 24, 2001, Filed

DISPOSITION: Trial court's judgment was affirmed, in part, reversed, in part, and cause was remanded.

COUNSEL: [*1] COUNSEL FOR APPELLANT: James P. Langendorf, Middletown, Ohio.

COUNSEL FOR APPELLEE: Lauren M. Ross, Springfield, Ohio.

JUDGES: Peter B. Abele, Presiding Judge. Kline, J. & Evans, J.: Concur in Judgment & Opinion.

OPINION BY: Peter B. Abele

OPINION

DECISION AND JUDGMENT ENTRY

ABELE, P.J.

This is an appeal from a Highland County Common Pleas Court summary judgment that granted, in part, and denied, in part, the summary judgment motions filed by the Greenfield Exempted Village School District Board of Education, defendant below and appellee/cross-appellant herein, and Thomas Gibbs, plaintiff below and appellant herein.

Appellant raises the following assignments of error:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CONTRACT BETWEEN MR. GIBBS AND THE BOARD WAS NOT BINDING."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY FAILING TO FIND THAT MR. GIBBS WAS ENTITLED TO STATUTORY DUE PROCESS UNDER *R.C. 3319.36* AND THE OHIO SUPREME COURT'S HOLDING IN *WHITLEY V. CANTON CITY SCHOOL DISTRICT BOARD OF ED, 38 Ohio St. 3d 300*[*, 528 N.E.2d 167*]."

Appellee/cross-appellant raises the following assignment of error:

"THE TRIAL COURT ERRED IN DENYING THE **[*2]** COUNTERCLAIM

OF THE GREENFIELD EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION TO RECOVER WAGES PAID TO PLAINTIFF BEYOND THE STATUTORILY PERMITTED TWO-MONTH TIME PERIOD."

The parties do not dispute the facts relevant to the instant appeal. On July 30, 1998, appellee and appellant entered into a written contract in which the parties agreed that appellant would serve as a school district administrator, specifically a "Middle School [Assistant] Principal/[Assistant] Athletic Director," for two years effective August 1, 1998. Following the parties' signatures, the contract contained the following clause: "It is understood that the administrator qualify for a valid certificate before the above contract is binding."

As of July 30, 1998, appellant possessed a provisional elementary teaching certificate valid for teaching grades one through eight. Appellant had not, however, received a principal certification from the State Board of Education. Appellant apparently expected to receive certification without incident.

After two months of appellant's employment as administrator had passed, Superintendent Phillip Cornett still had not received evidence of appellant's certification. **[*3]** Throughout the next several months, Cornett questioned appellant as to why he had not received the certificate and "each time he had an excuse as to why he did not receive it."

By letter dated January 19, 1999, the State Board of Education (Board) advised appellant that it had passed a resolution declaring its intention to deny his pending application for principal certification. The Board noted that appellant had a 1995 disorderly conduct conviction and a 1996 unauthorized use of property conviction.

Cornett subsequently became aware of the Board's intent to deny appellant's application. Cornett asked appellant why the Board intended to take this action and appellant replied that "it was due to shoplifting a pair of speedos."

Cornett then contacted a Board member and learned that appellant had two criminal convictions. The Board member advised Cornett that he did not know when appellant would receive a principal certificate and that a possibility existed that appellant might not receive a principal certificate.

Cornett considered placing appellant on a leave of absence but ultimately decided to declare appellant's contract null and void, as of February 3, 1999, due to appellant's **[*4]** failure to qualify for a certificate. To that end, Cornett advised appellant via written letter that appellant's "services for the position of Assistant Middle School/Elementary Principal/Assistant Athletic Director, are hereby null and void. As of this date, you have not fulfilled the requirements under O.R.C. 3319 for proper principal's certification."

In August of 1999, appellant and the Board entered into a "consent agreement." Under the agreement (1) the Board suspended appellant's current four-year elementary teaching certificate for four months; (2) after the expiration of the four months, the Board issued appellant a new four-year provisional principal certificate; and (3) appellant completed sixty hours of community service. On September 16, 1999, the Board issued appellant a principal certificate valid "July 1, 1998 thru June 30, 2002."

On December 21, 1999, appellant filed a complaint against appellee and asserted that: (1) appellee violated his due process rights by failing to provide appellant with a hearing; (2) appellee breached the contract by terminating appellant without cause; and (3) the doctrine of promissory estoppel applied to prevent appellee from claiming **[*5]** the non-existence of the contract.

On January 31, 2000, appellee filed an answer and counterclaim. Appellee denied that it deprived appellant of due process or that it breached the contract. Rather, appellee asserted that appellant's contract "was void as a matter of law after the first two months of his initial employment." Appellee's counterclaim sought reimbursement of the funds it paid to appellant in violation of *R.C. 3319.30*. [1]

1 *R.C. Chapter 3319* prohibits payment, beyond a two-month period, to a "teacher" (a "teacher" includes a principal, see *R.C. 3319.09(A)*) who lacks proper certification. See *R.C. 3319.30* and *3319.36(C)(1)*.

The parties subsequently filed cross-motions for summary judgment. On May 15, 2001, the trial court (1)

granted appellee's summary judgment motion with respect to appellant's contract claim, (2) denied appellee's summary judgment motion with respect to its fund reimbursement claim, and (3) granted appellant's **[*6]** summary judgment motion with respect to appellee's fund reimbursement claim.

Appellant filed a timely notice of appeal and appellee filed a timely notice of cross-appeal.

I

In his first and second assignments of error, appellant argues that the trial court erred by granting appellee summary judgment. [2] Specifically, appellant asserts that the trial court erred by determining that: (1) the contract between appellant and appellee was not binding; (2) the procedures set forth in *R.C. 3319.36* regarding termination of teachers did not apply to appellant; and (3) *Whitley v. Canton City School Dist. Bd. of Ed. (1988), 38 Ohio St. 3d 300, 528 N.E.2d 167*, did not control the trial court's resolution of appellant's claims.

> 2 We note that appellant did not separately argue his assignments of error as *App.R. 16(A)* requires. *App.R. 12(A)(2)* permits an appellate court to "disregard an assignment of error presented for review if the party raising it * * * fails to argue the assignment separately." We will nevertheless consider appellant's two assignments of error.
>
> We further recognize that appellant, in his "statement of facts," appears to raise several additional reasons why the trial court erred by granting appellee summary judgment. To the extent appellant did not properly present these apparent arguments as assignments of error or as arguments in support of his assignments of error, we decline to address them. See *App.R. 16(A)(6)* and *(7)*; *App.R. 12(A)(1)(b)* (stating that a court of appeals shall "determine the appeal on its merits *on the assignments of error*") (emphasis added).

[*7] Appellee claims that the trial court properly granted summary judgment with respect to appellant's complaint because the contract was not binding. Appellee notes that the contract was not binding because the contract specified that appellant would "qualify for a certificate before the contract" would become binding. Appellee further argues that the trial court did not err by determining that appellant was not entitled to the statutory due process rights contained in *R.C. 3319.16*. Appellee contends that because the contract never became binding, appellant was not a "teacher" and thus, *R.C. 3319.16*, which applies to "teachers," did not provide appellant with due process protections.

We initially note that when reviewing a trial court's decision regarding a motion for summary judgment, an appellate court conducts a *de novo* review. See, *e.g.*, *Grafton v. Ohio Edison Co. (1996), 77 Ohio St. 3d 102, 105, 671 N.E.2d 241, 245*. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and need not defer to the trial court's decision. See, *e.g.*, *Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App. 3d 704, 711, 622 N.E.2d 1153, 1157*; **[*8]** *Morehead v. Conley (1991), 75 Ohio App. 3d 409, 411-12, 599 N.E.2d 786, 788*. In determining whether a trial court properly granted a motion for summary judgment, an appellate court must review the standard for granting a motion for summary judgment as set forth in *Civ.R. 56*, as well as the applicable law.

Civ.R. 56(C) provides, in relevant part, as follows:

> * * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed **[*9]** most strongly in the party's favor.

Thus, a trial court may not grant a motion for summary judgment unless the evidence before the court

demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, *e.g.*, *Vahila v. Hall (1997), 77 Ohio St. 3d 421, 429-30, 674 N.E.2d 1164, 1171*.

In the case at bar, we agree with the trial court that no genuine issues of material fact remain regarding appellant's claims for relief and that appellee is entitled to judgment as a matter of law.

The interpretation of a clear and unambiguous contract is a matter of law. See, *e.g.*, *Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St. 2d 241, 374 N.E.2d 146*, paragraph one of the syllabus. In interpreting a clear and unambiguous contract, the contract "'must be considered and construed as a whole, taking it by **[*10]** the four corners as it were, and giving effect to every part * * *.'" *Chan v. Miami Univ. (1995), 73 Ohio St. 3d 52, 57, 652 N.E.2d 644, 648* (quoting *Brown v. Fowler (1902), 65 Ohio St. 507, 523, 63 N.E. 76, 78)*.

In the case at bar, the contract clearly specifies that appellant must qualify for a valid certificate before the contract becomes binding. The contract included a provision stating: "It is understood that the administrator qualify for a valid certificate before the above contract is binding."

"The term 'qualified' has been defined by the legislature to mean qualified by certification by the State Board of Education." *Fisler v. Mayfield City Sch. Dist. Bd. of Educ., 1985 Ohio App. LEXIS 9121* (Oct. 31, 1985) Cuyahoga App. No. 49548, unreported; see, also, *Anderson v. Wolf (1940), 32 Ohio L. Abs. 193* (stating that the "spirit" of the teacher certification provisions "is to assure that a teacher shall be fully qualified" and that "the certificate is the authenticated evidence of that fact"). A teacher who is not "qualified" is not entitled to employment beyond the two-month safe harbor provision contained in *R.C. 3319.36(C)(1)*. [3] **[*11]** See *Cominsky v. Tallman, 1979 Ohio App. LEXIS 11280* (Dec. 20, 1979) Cuyahoga App. No. 39878, unreported (stating that a school had no obligation to employ a teacher as a part-time assistant principal when the teacher lacked the proper certification); *Beatley v. Indian Lake Loc. Bd. of Educ., 1979 Ohio App. LEXIS 10719* (Nov. 16, 1979) Logan App. No. 8-79-2, unreported (stating that a written teacher contract "can have no viability without" the occurrence of certain conditions precedent, such as "proper certification"); Baker, Ohio School Law (2001), Section 7.02, 309. As Baker's treatise notes:

> "If a teacher does not hold a license qualifying him to teach a subject actually being offered as a part of the school curriculum, the board of education has no obligation to continue that teacher in its employment. * * * * Likewise, a teacher who has allowed his license to lapse is no longer a 'teacher' and has no right to continued employment in the district irrespective of his contract status."

Id. (footnotes omitted).

3 3319.36 provides:

> (A) No treasurer of a board of education or educational service center shall draw a check for the payment of a teacher for services until the teacher files with the treasurer both of the following:
>
> (1) Such reports as are required by the state board of education, the school district board of education, or the superintendent of schools;
>
> (2) Except for a teacher who is engaged pursuant to section 3319.301 [3319.3 0.1] of the Revised Code and except as provided under division (B) of this section, a written statement from the city or exempted village district superintendent or the educational service center superintendent that the teacher has filed with the treasurer a legal educator license or internship certificate, or true copy of it, to teach the subjects or grades taught, with the dates of its validity. The state board of

> education shall prescribe the record and administration for such filing of educator licenses and internship certificates in educational service centers.
>
> * * * *
>
> (C) Notwithstanding division (A) of this section, the treasurer may pay either of the following:
>
> (1) Any teacher for services rendered during the first two months of the teacher's initial employment with the school district or educational service center, provided such teacher is the holder of a bachelor's degree or higher and has filed with the state board of education an application for the issuance of a provisional or professional educator license;
>
> * * * *

[*12] For example, in *Antram v. Jonathan Alder Loc. Sch. Dist., 1993 Ohio App. LEXIS 814* (Feb. 16, 1993) Madison App. CA92-08-021, unreported, Antram was a teacher hired as a certified vocational-agricultural ("VO-AG") teacher for the 1986-1987 school year. Antram's contract was not renewed, however, because the school eliminated the VO-AG program.

In the summer of 1987, the superintendent offered Antram a one-year contract for a half-time learning disability ("LD") tutor position for the 1987-1988 school year. Antram agreed and signed a "Teacher's Contract." At that time, Antram was certified in VO-AG and elementary education, but not in LD. Antram subsequently received temporary LD certification, contingent upon completing the course work required to obtain a permanent LD certificate.

In the spring of 1989, Antram received a three-year limited contract for the school year beginning in 1989. Antram added the notation: "I will serve this school in the capacity selected by the Administrator (1/2 time LD), but I still consider myself available for a full-time position."

In the spring of 1989, Antram had completed only three of the required courses needed to obtain the LD certificate. He, received, however, **[*13]** a third temporary LD certificate. To obtain the third temporary certification, he had provided a letter from Ashland College stating that he intended to register for classes in the fall. He did not register for fall classes.

In late summer of 1990, Antram advised the superintendent that he had not completed the course work and asked for help in obtaining a fourth temporary certificate. The board refused to issue a fourth temporary certificate. The school terminated Antram's contract stating that it could not continue to employ a teacher who lacked proper certification.

Antram appealed his termination and argued that (1) the school wrongly terminated his contract because it was a three- year teaching contract; and (2) and he was certified to teach elementary education. Antram asserted that his failure to obtain a LD certification was irrelevant. The appellate court disagreed, however, stating that a school district does not have a duty to continue employment of one who lacks proper certification for the position for which the teacher was hired.

Like *Antram*, in the case at bar appellant failed to qualify for or obtain proper certification. Thus, like the school district in **[*14]** *Antram*, appellee had no obligation to continue appellant's employment when appellant lacked the certification needed for the position for which he was hired.

Moreover, we note that appellant did not "qualify" for a valid certificate, as the contract specified, until the Board issued his principal certificate on September 16, 1999. See *Fisler, supra, 1985 Ohio App. LEXIS 9121* (stating that the term "qualified" means evidence of certification). Appellant did not receive evidence of certification until September 16, 1999. Thus, because appellant failed to "qualify" for a valid certificate, we agree with the trial court's conclusion that the contract was not binding and that appellee was not obligated to continue appellant's employment. The plain meaning of the provision in the contract specifying that appellant qualify for a valid certificate is that neither appellee nor appellant incurred any obligation under the contract unless and until appellant qualified for a valid certificate.

Appellant asserts that he did eventually "qualify" for a valid certificate and, because the contract did not

specify when he must "qualify" for a valid certificate, he fulfilled the contract's condition. Thus, appellant **[*15]** reasons that appellee breached the contract. We note, however, that "when no time is fixed for the performance of a contract, a reasonable time is implied." *Harris v. Ohio Oil Co. (1897), 57 Ohio St. 118, 127, 48 N.E. 502, 505*; see, also, *Stern Enterprises v. Plaza Theaters I and II, Inc. (1995), 105 Ohio App. 3d 601, 607, 664 N.E.2d 981, 985*; *Ross v. Reeves, 1999 Ohio App. LEXIS 4032* (Sept. 1, 1999) Wayne App. Nos. 98 CA 9 and 10, unreported. We do not believe that performance that occurs well over one year after the signing of the contract constitutes a reasonable time.

We further disagree with appellant's argument that appellee "waived" the contract condition that appellant "qualify" for a valid certificate before the contract would become binding. Appellant claims that because appellee did not immediately enforce the qualification provision of the contract, appellee effectively waived the condition. The record reveals, however, that Cornett, on several occasions questioned appellant about his failure to present a valid principal certificate and that each time, appellant had an excuse. Cornett simply gave appellant the benefit of the doubt that the Board would eventually **[*16]** issue a principal certificate to appellant in a timely manner. Once Cornett learned that the Board intended to deny appellant's certificate, Cornett then sought to enforce the contract provision. We do not believe that appellee, under the facts and circumstances present in the case *sub judice*, waived its right to enforce the contract provision.

Moreover, we disagree with appellant's argument that *Whitley v. Canton City Sch. Dist. (1988), 38 Ohio St. 3d 300, 528 N.E.2d 167*, requires, in all circumstances, a certificate to be considered valid as of the effective date noted on the certificate. In *Whitley*, the Ohio Supreme Court held:

> "Where a contractual dispute arises between a school board and a teacher regarding the date of the teacher's certification, the teacher will be considered certified on the date the certificate issued by the Ohio Department of Education became effective unless the contract specifically provides to the contrary."

Id., paragraph two of the syllabus.

Whitley differs from the case at bar in several respects. First, little doubt existed that Whitley would receive proper certification. Second, Whitley did, in fact, **[*17]** receive proper certification within a reasonable time and shortly after the start of the school year. Third, the Board did not suspend Whitley's certificate. Fourth, the Board did not indicate an intention to refuse to issue a certificate. Under the foregoing circumstances, the Ohio Supreme Court concluded that it would be irrational to hold that Whitley was not certified until the date the State Board of Education actually issued the certificate. Instead, the court sanctioned the Board's practice of making "all certificates effective on July 1 irrespective of the date of issuance." *38 Ohio St. 3d at 302, 528 N.E.2d at 170*.

In the case at bar, unlike *Whitley*, (1) appellant did not receive proper certification shortly after the start of the school year (and thus, not within a reasonable time), (2) appellant's elementary teaching certificate was suspended, (3) the Board indicated its intention to deny appellant a principal certification, and (4) the Board did not issue appellant a certificate until September 16, 1999, [4] after appellant's four- month suspension expired and over one year after appellant's employment with appellee initially began. It makes little **[*18]** sense to apply *Whitley* to the case at bar and hold that appellant became "certified" as a principal on July 1, 1998 for four years, even though during that time period the Board refused to issue a principal certificate and suspended appellant's current certificate.

> 4 We note, as the *Whitley* court did, that the Board has a practice of making all certificates valid as of July 1 regardless of what date the certificate actually was issued. In the case at bar, the Board issued the certificate in September of 1999, but did not make appellant's certificate effective as of July 1, 1999. Instead, for reasons indiscernible from the record, the Board made appellant's certificate effective as of July 1, 1998.

Moreover, as we discussed above, the contract specified that appellant "qualify" for a valid certificate before the contract became binding. As we previously stated, appellant did not "qualify" for a valid certificate

within a reasonable time.

We next consider appellant's claim that he was deprived of the **[*19]** statutory due process protections contained in *R.C. 3319.26*. In *Bixby v. Board of Educ. of the Lorain Cty. Joint Vocational Sch. Dist., 1985 Ohio App. LEXIS 9618* (Dec. 11, 1985) Lorain App. No. 3895, unreported, the court considered a similar argument. In *Bixby* the teacher (1) did not hold "an effective teaching certificate"; (2) had been employed under a three-year limited teaching contract set to expire in 1986; and (3) possessed a provisional teaching certificate that expired on June 30, 1984. Before the certificate expired, the teacher applied for a renewal with the school superintendent. The superintendent refused to sign the renewal, however, due to pending sex charges against the teacher. On August 20, 1984, the Board of Education notified the teacher that his services were no longer required. The teacher asked for reinstatement and claimed that he was entitled to a pre-termination hearing under *R.C. 3319.16*. The court of appeals disagreed, stating that *R.C. 3319.16* applies to "teachers" and that Bixby, who as of the date the Board informed him that his services were no longer required, did not hold a teaching certificate. **[*20]** Thus, *Bixby* was not a "teacher"--a person certified to teach.

We agree with the *Bixby* court's reasoning. In the case at bar, appellant lacked proper certification for the position for which he was hired. Thus, like the teacher in *Bixby*, appellant was not entitled to the *R.C. 3319.16* due process protections.

Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error.

II

In its cross-assignment of error, appellee(cross-appellant) argues that the trial court erred by granting appellant summary judgment with respect to appellee's claim for reimbursement of the salary it paid to appellant in violation of *R.C. 3319.36(D)*. Appellee asserts that the trial court erroneously concluded that *R.C. 117.28* provides the only method by which a school district may seek reimbursement of improper expenditures. We agree with appellee.

R.C. 117.28 provides as follows:

> Where an audit report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public **[*21]** money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving the certified copy of the report pursuant to *section 117.27 of the Revised Code* may, within one hundred twenty days after receiving the report, institute civil action in the proper court in the name of the public office to which the public money is due or the public property belongs for the recovery of the money or property and prosecute the action to final determination.

The auditor of state shall notify the attorney general in writing of every audit report which sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated and of the date that the report was filed.

Within one hundred twenty days after receiving the certified copy of the report, the officer receiving the report shall notify the attorney general in writing of whether any legal action has been taken. If no legal action has been taken, the officer shall, within the same period, notify the **[*22]** attorney general in writing of the reason why legal action has not been taken. The attorney general or his assistant may appear in any such action on behalf of the public office and may, either in conjunction with or independent of the officer receiving the report, prosecute an action to final determination. The attorney general may bring the action in any case where the officer fails to do so within one hundred twenty days after the audit report has been filed.

R.C. 117.28 is a remedial statute that should be construed liberally in order to effect its purpose. *State ex rel. Holcomb v. Walton (1990), 66 Ohio App. 3d 751, 756, 586 N.E.2d 176, 179*. The purpose of *R.C. 117.28* is "'to protect and safeguard public property and public moneys.'" *Id.* (quoting *Portage Lakes Joint Voc. Sch. Dist. Bd. v. Bowman (1984), 14 Ohio App. 3d 132, 135, 470 N.E.2d 233, 236*, and *State ex rel. Smith, v. Maharry (1918), 97 Ohio St. 272, 276, 119 N.E. 822, 823)*.

This court has previously stated that *R.C. 117.28* does not appear to provide the only means by which a board of education **[*23]** may recover funds. See *Green Local Teachers Assn. V. Blevins (1987), 43 Ohio App. 3d 71, 74, 539 N.E.2d 653, 657*. Thus, based upon our prior holding, and considering that *R.C. 117.28* is to be liberally construed in order to protect and safeguard public moneys, we agree with appellee that *R.C. 117.28* is not the only means by which a school district may recover improper expenditures. We therefore agree with appellee that the trial court erred by granting appellant summary judgment with respect to appellee's counterclaim.

Accordingly, based upon the foregoing reasons, we sustain appellee's cross-assignment of error and, to this limited extent, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion. In all other respects, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. Appellee shall **[*24]** recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

Kline, J. & Evans, J.: Concur in Judgment & Opinion

For the Court

BY: Peter B. Abele

Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

State of Ohio, Department of Highway Safety, Bureau of Motor Vehicles, APPELLANTS -vs- Brona Johnson, et al., APPELLEES

NO. L-81-151

COURT OF APPEALS, SIXTH APPELLATE DISTRICT, LUCAS COUNTY, OHIO

1981 Ohio App. LEXIS 13540

October 30, 1981

PRIOR HISTORY: **[*1]** APPEAL FROM Common Pleas COURT NO. CV-80-1878

JUDGES: John W. Potter, Andy Douglas and Frank W. Wiley, JJ., concur. Judge Frank W. Wiley, Retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

OPINION

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

DECISION & JOURNAL ENTRY

This case comes before this court on appeal from judgment of the Lucas County Court of Common Pleas, dismissing appellant's complaint as to appellee, Insurance Company of North America.

Appellant, the State of Ohio, Bureau of Motor Vehicles, made an examination of the records and accounts of one Brona Johnson, a former deputy registrar of the bureau in Lucas County. The examination of the accounts revealed a deficiency of $13,100.21. Appellant, thereafter, filed a complaint in the Lucas County Court of Common Pleas seeking payment of said deficiency. Appellee was named as a party to said complaint in its capacity as surety under a blanket bond issued by appellee to cover the operations of appellant's deputy registrars.

In response **[*2]** to appellant's complaint, appellee filed a motion to dismiss appellant's complaint as to appellee on the ground that appellant had failed to state a claim against appellee upon which relief might be grated. Appellee's motion was based upon appellant's failure to bring its action in accordance with *R.C. 117.10* and upon appellant's failure to set forth, by way of attached documentary evidence, sufficient operative facts to constitute a claim against appellee.

The trial court granted appellee's motion to dismiss and appellant timely brought this appeal, presenting the following assignments of error:

"1. Paragraph two and Exhibit A were erroneously stricken from the complaint.

"2. Assuming, *arguendo*, that the aforementioned material was correctly stricken, the trial court erred in granting the motion to dismiss as the appropriate procedure was a motion for a definite statement.

"3. Assuming, *arguendo*, that the aforementioned material was correctly stricken and a motion to dismiss was the appropriate procedure the complaint still stated a

claim for relief and the trial court erred in dismissing the complaint.

"4. The procedure used to draw the shortage to the attention **[*3]** of the Attorney General's office is immaterial as the Attorney General has common law authority to proceed herein."

We shall first consider appellant's fourth assignment of error since we find that this assignment of error, if decided adversely to appellant, would be dispositive of this appeal. Appellant has admitted that a Chapter 117 report was not performed in this case, but contends that the action was properly instituted under *Chapter 115 of the Revised Code* and under the attorney general's common law powers. Thus, the issue presented by this assignment of error is whether *R.C. 117.10* provides the exclusive method by which the state may institute an action to collect shortages in public funds.

Chapter 117 of the Revised Code provides for the creation of the Bureau of Inspection and Supervision of Public Offices, which bureau is charged with the responsibility for supervising and inspecting the accounts of public offices. *R.C. 117.10* provides the procedure for reporting the results of examinations of such accounts and further provides the procedure for instituting actions thereon where warranted.

Chapter 115 sets forth the duties and powers of the State Auditor. **[*4]** *R.C. 115.10* and *115.17* provide procedures by which claims due the state may be certified to the state auditor and attorney general for collection.

Appellee contends that *R.C. 117.10* provides the exclusive method by which shortages in public funds may be collected and that *R.C. 115.10* and *115.17* are, therefore, not applicable. To support this contention, appellee urges consideration of OAG 78-005, in which the attorney general determined, at paragraph 1 of the syllabus that:

"1. State liquor store cash and merchandise shortages determined by means of an interim departmental audit are not claims due and payable to the state subject to the provisions of *R.C. 115.10*. Cash and merchandise shortages not collected by the Department of Liquor Control should be recovered by means of a civil action instituted pursuant to *R.C. 117.10*."

In reaching this determination, however, the attorney general did not find that *R.C. 117.10* provided the exclusive method for collecting shortages in public funds, but found that *R.C. 115.10* was not applicable to the case presented. Reasoning as follows, at 2-10, the attorney general found that the deficiency therein had not yet matured into a "claim" **[*5]** as contemplated by *R.C. 115.10* for the reason that there was no identifiable party against whom such a claim could be asserted:

"Prior to the appellate court decisions in *Weiner v. Crouch, 120 Ohio App. 49 (1963)* and *In Re Matter of Drain*, *28 Ohio App. 2d 102 (1970)*, the Department of Liquor Control's right to assert claims for store shortages was based on Department of Liquor Control, Regulation IV, B5, which provided that a store manager was personally liable for all monies received by the store. On the basis of this regulation, the Director of Liquor Control required all store managers to pay to the State an amount equal to any shortages found by an auditor less the statutory allowance for breakage. Thus, under this regulation, any shortage could immediately result in an identifiable, assertable claim against a known party responsible for payment. The Franklin County Court of Appeals in *Weiner, supra*, and the Montgomery County Court of Appeals in *Drain, supra*, have held, however, that a manager of a state liquor store is not a public officer and is not, therefore, responsible for cash or merchandise shortages without proof of complicity or guilt. In **[*6]** view of these appellate court decisions, it is my opinion that a cash or merchandise shortage shown by means of a bi-monthly departmental audit does not automatically give rise to a claim due and payable the state subject to the provisions of *R.C. 115.10*, since, without further investigation and an adjudication of the liability of the various parties responsible for the care and custody of liquor store funds and property, the department cannot assert a claim for the recovery of the shortage as a matter of right."

In the instant case, however, there is an identifiable party, former deputy registrar Johnson, against whom such a claim can be asserted.

Further, we note the following language in the attorney general's opinion, at 2-10, which tends to support appellant's position that the remedies available to the state for recovering losses from public funds are not exclusive:

"Although *R.C. 115.10* is very broad and general, it is not the only procedure for asserting and collecting

money due the State. The Department of Liquor Control itself has, pursuant to *R.C. 4301.10*, the power to investigage store shortages and to bring suit to recover such losses shown by means of an interim **[*7]** audit. *R.C. Chapter 117* also provides for the assertion of claims arising from the loss of or failure to account for public funds."

That position is also supported by the Ohio Supreme Court's decision in State, ex rel. Smith, v. Maharry (1918), *97 Ohio St. 272*, wherein the court, in determining that Section 286 of the General Code was available in a case which might have been brought under another statutory provision, stated, at 279 that:

". . . Public authorities have their option as to which sections they will utilize in protecting public money and public property."

Considering the foregoing, we find that the statutory sections providing for the procedure by which actions to recover losses of public funds may be instituted are not mutually exclusive and the state may proceed under any section applicable to the case.

Furthermore, we find that the attorney general has all the common law powers and duties pertaining to his office except where those powers and duties have been expressly proscribed. Ohio v. United Transportation, Inc. (1981), *506 F. Supp. 1278*. Thus, it has been held that the attorney general may proceed, on his own initiative, to bring an action **[*8]** on behalf of the state to assert the state's rights or to protect public property. See, State, ex rel. Brown, v. Regional Public Safety Service Corp. (1975), *47 Ohio App. 2d 300*; State, ex rel. Brown, v. Newport Concrete Co. (1975), *44 Ohio App. 2d 121*; United Trasportation, supra. We, therefore, further find that the attorney general may have brought this action, on his own initiative, pursuant to his common law powers.

For the foregoing reasons, we find appellant's fourth assignment of error well taken.

We shall now consider appellant's first, second, and third assignment of error together since the same issues are raised therein.

Appellant contends that the trial court erred in striking paragraph 2 and exhibit A from appellant's complaint and in dismissing appellant's complaint for the reason that the complaint and attached documentation met the requirements of *Civ. R. 8(A)* and *10 (D)*.

Civ. R. 8(A) provides, in pertinent part, that:

"A pleading which sets forth a claim for relief, . . ., shall contain (1) *a short and plain statement* of the claim showing that the pleader is entitled to relief, . . ." (Emphasis added.)

Civ. R. 10(D) provides that:

[*9] "When any claim or defense *is founded on* an account or other written instrument, a copy thereof must be attached to the pleading. If not so attached, the reason for the omission must be stated in the pleading." (Emphasis added.)

Appellant's exhibit A consisted of detailed debit memoranda showing the deficiencies in the deputy registrar's accounts. These memoranda evidenced the deficiency but were not accounts upon which the claim was founded as contemplated by *Civ. R. 10(D)*. The written instrument upon which appellant's claim as to appellee was founded was the Public Employee's Blanket Bond issued by appellee, a copy of which was attached to appellant's complaint. We, therefore, find that appellant complied with *Civ. R. 10(D)*.

Notwithstanding the foregoing, we note that the proper procedure in attacking the failure of a plaintiff to attach a copy of a written instrument is to move for a definite statement under *Civ. R. 12(E)* rather than for dismissal. Point Rental Co. v. Posani (1976), *52 Ohio App. 2d 183, at 186*.

Appellee contends, however, that appellant's complaint and attached documentation failed to set forth sufficient operative facts to state a claim **[*10]** upon which relief might be granted.

In paragraph two of the syllabus in DeVore v. Mut. of Omaha (1972), *32 Ohio App. 2d 36*, the Court of Appeals for Mahoning County held that:

"Paragraphs (A) and (E) of *Rule 8 of the Ohio Rules of Civil Procedure* require that sufficient operative facts be concisely set forth in a claim so as to give fair notice of the nature of the action and permits as many claims for relief, legal or equitable, to which a party may be entitled under the operative facts."

Considering appellant's complaint and attached

documentation, we find that sufficient operative facts were set forth so as to give appellee fair notice of the nature of the action.

Further, we note that a motion to dismiss on the ground that a complaint fails to state a claim upon which relief may be granted should be sustained only where it appears that no set of facts could be established by evidence which would entitle complainant to the relief requested. O'Brien v. University Community Tenants Union (1975), *42 Ohio St. 2d 242*; Kodish v. Board (1975), *45 Ohio App. 2d 147*; Stephens v. Boothby (1974), *40 Ohio App. 2d 197*.

For the foregoing reasons, we find appellant's first, second and **[*11]** third assignments of error well taken.

On consideration whereof, the court finds substantial justice has not been done the party complaining, and judgment of the Lucas County Court of Common Pleas is reversed.

This cause is remanded to said court for further proceedings in accordance with law. Costs to abide final determination.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.* See also Supp. R. 4, amended 1/1/80.